

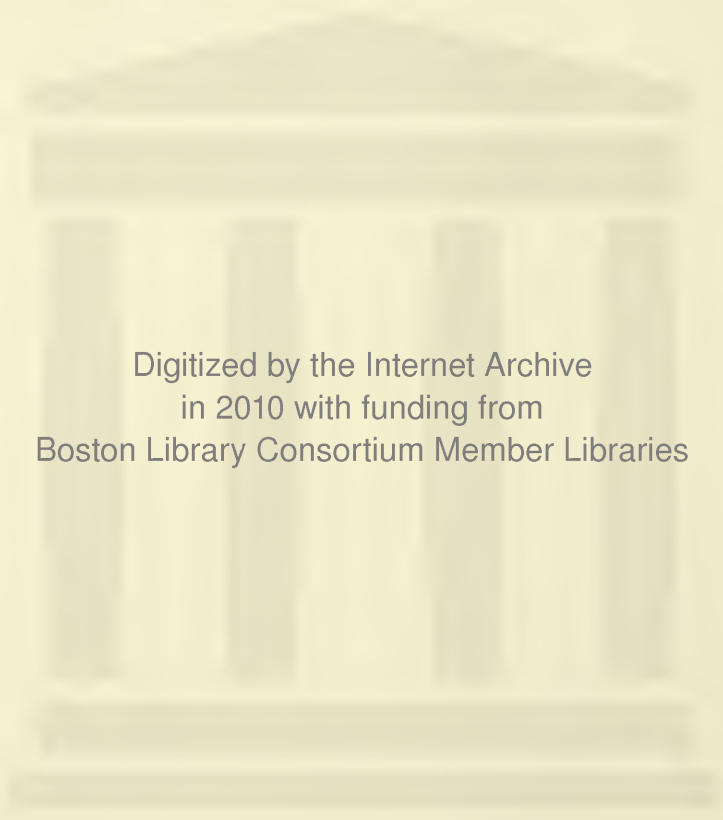
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JUDICIAL COUNCIL OF MASSACHUSETTS



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54th REPORT 1978

THE ADMINISTRATION OF JUSTICE
WORKMEN'S COMPENSATION AND
ALTERNATIVE SENTENCES
SPECIAL GUARDIANS OF ADULTS
CONSUMER PROTECTION
SENTENCING

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(JANUARY 1979)**

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JAMES B. MULDOON *of Weston*, Secretary
Two Center Plaza, Boston, Mass. 02108

INQUIRIES CONCERNING THE JUDICIAL COUNCIL

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Persons interested in matters under consideration by the Judicial Council and in the improvement of the judicial system of the Commonwealth are invited to communicate with the Secretary of the Judicial Council, James B. Muldoon, 2 Center Plaza, Boston, Massachusetts 02108.



54th REPORT

Judicial Council of Massachusetts
—1978—

CONTENTS OF THIS REPORT

MEMBERSHIP OF THE JUDICIAL COUNCIL.....	inside cover
THE ACT CREATING THE JUDICIAL COUNCIL.....	5
TABLE OF LEGISLATION REFERRED TO THE JUDICIAL COUNCIL IN 1978.....	6
I. GENERAL OBSERVATIONS ON THE ADMINISTRATION OF JUSTICE.....	7
A. The Consolidation of the Trial Courts.....	7
1. Legislative Intent.....	7
2. Deployment of Resources.....	8
3. Continuing Study of the Judicial System.....	8
B. Statistics	9
C. Court Buildings Survey.....	9
D. Facilities for Jury Trials in Divisions of the District Court Department.....	10
E. Juvenile Appeals Session.....	11
F. The Cost of Improvement to Facilities.....	11
G. Leases and Acquisition of Court Buildings.....	11
H. Retired Justices.....	12
I. Administration of Justice Under Emergency Conditions	12
J. Zoning Appeals.....	13

K. Uniform Traffic Citations (Non-Criminal).....	13
L. Consumer Actions.....	14
M. Judicial System Budget.....	14
N. Trial Court Assignments.....	15
O. Commission on Judicial Conduct.....	16
P. Special Justices.....	18
Q. Trial De Novo in Criminal Cases.....	19
R. Magistrates.....	20
S. Remand Cases — \$7,500.....	20
T. Special Studies Mandated by Chapter 478 of the Acts of 1978.....	20
1. Probation.....	20
2. Jurisdictional Lines.....	21
3. Court Fees.....	21
4. Committee on Criminal Justice.....	21
U. The Appeals Court.....	21
II. WORKMEN'S COMPENSATION COVERAGE — ALTERNATIVE SENTENCING.....	23
A. Limiting Liability for Injuries or Death of Participants In Programs In Lieu of Sentencing.....	23
1. Definition of Employee.....	24
2. Contract of Hire.....	24
3. Existing Work Release Programs.....	25
4. Rehabilitation to be Encouraged.....	25
5. "Community Service".....	26
III. SPECIAL GUARDIANSHIP.....	27
A. Problems of Elderly and Disabled Persons.....	39
B. Special "Guardians".....	40
C. Costs of Program.....	41
D. Recommendation.....	42
IV. CONSUMER PROTECTION.....	43
A. Exhaustion of Administrative Remedies.....	43
B. Unfair or Deceptive Insurance Practices.....	45
C. Enforcement by District Attorneys.....	47
D. Additional Definitions in Class Actions.....	50
E. Findings of the Federal Trade Commission.....	63
F. Action by Attorney General in Federal Trade Commission Cases.....	64
G. Costs and Attorney's Fees for the Commonwealth.....	64

- H. Contempts 65
- I. “Willful and Continuous” Violations..... 65
- J. Action Without Proof of Loss of Money or
Property 66
- K. Expansion of Special Statutory Class Actions
under Chapter 93A..... 68
 - 1. Present State of Massachusetts Class
Actions 68
 - 2. Special Consumer Procedures..... 70
 - 3. The Proposed Amendment to Section 9(2)..... 71
- L. Class Actions Procedures or Deceptive
“Methods” 73
- M. Attorney’s Fees in Class Actions Where no
Money or Property Damages are
Involved 74
- V. SENTENCING 76**
 - A. Initial Special Committee Proposal..... 77
 - B. Minimum Sentence..... 80
 - C. LEAA Study..... 82
 - D. Superior Court Study..... 82



The Commonwealth of Massachusetts

February, 1979

THE HONORABLE EDWARD J. KING
Governor of Massachusetts

Dear Governor King:

In accordance with the provisions of Chapter 221, Section 34A of the General Laws, we have the honor to transmit the fifty-fourth report of the Judicial Council for the year 1978.

JACOB J. SPIEGEL, CHAIRMAN
PAUL T. SMITH, VICE CHAIRMAN
SALLY CORWIN
HARRY J. ELAM
CLIFFORD E. ELIAS
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JUDICIAL COUNCIL**G.L. Chapter 221, §§34A-34C**

The Judicial Council was established to make a continuous independent study of the organization, procedure, and practice of the courts.

The Council makes recommendations requested by the legislature and suggests improvements in the administration of justice.

Statutory Authority

Section 34A. There shall be a judicial council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the appeals court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the chief judge of the probate courts in the commonwealth or some other judge or former judge of those courts appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the district courts in the commonwealth or some other justice or former justice of those courts appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods, not exceeding four years, as he shall determine.

Section 34B. The Judicial Council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

Section 34C. No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof, shall receive from the Commonwealth a salary of ten thousand dollars.

**1978 HOUSE AND SENATE BILLS
REFERRED TO THE JUDICIAL COUNCIL**

1978 Bill Number	1978 Resolve Chapter	Subject Matter	Page In This Report
S 104	10	An Act further regulating business practices for consumer protection.....	47
S 121	10	An Act further regulating business practices for consumer protection.....	50
H 972	10		
S 708	11	An Act limiting the liability for personal injuries or death suffered by a defendant while participating in a program in lieu of a sentence for certain violation of law.....	23
S 1504	15	An Act for the appointment of guardians of adults.....	27
H 4985	10	An Act repealing the law relative to eliminating the procedure for removing certain consumer protection cases to regulatory agencies...	43
H 5184	10	An Act enlarging civil remedies for consumer protection.....	45

I.

GENERAL OBSERVATIONS ON THE ADMINISTRATION OF JUSTICE

A. The Consolidation of the Trial Courts

The court consolidation or reorganization act, Chapter 478 of the Acts of 1978, was approved by the Governor on July 18, 1978.

Most of the changes mandated by this act will become effective by July 1, 1979. It will take considerably longer before the new consolidated trial court will be operating smoothly and we anticipate that additional legislation may be necessary to make the consolidation work to the best advantage of the citizens of the Commonwealth.

The major change effected by this legislation was to create one single trial court of the Commonwealth consisting of the Superior, Land, Probate and Family and Housing Court Departments and the District, Municipal and Juvenile Court Departments on another.

In the discharge of its obligation to engage in the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the Commonwealth, and the work accomplished by it, the Judicial Council begins a new phase in its 54 year history.

Many important advancements in judicial administration were achieved in the enactment of Chapter 478 of the Acts of 1978 — the “Courts-Consolidation” Act.

1. Legislative Intent

It appears clear that the intent of the General Court in enacting Chapter 478 of 1978 was to

“... provide for an administrative consolidation of the several courts of trial jurisdiction, so as to encourage a broader availability of personnel and other resources for the hearing of all causes on an equitable basis by the several justices of the trial court. . . .”

This act also provides for increased powers, duties and responsibilities of certain judicial and non-judicial personnel.

It was the intent of the General Court to increase its effectiveness and efficient operation, not to derogate from or to impair the existing structure or the tenure, powers, or authority thereof.

The fiscal result of the legislation is to cast the financial burden of the judicial system on the state and thus remove this burden from the counties and, ultimately, from the real estate taxpayer in the cities and towns.

2. Deployment of Resources

In order to accomplish the mission of consolidation and unified operation of the judicial system, there must be a sound program of administration and finance. Such a program is in the process of development.

The physical assets of the judicial system are to be used to serve the needs of the whole judicial branch.

The human resources of the judicial system will be deployed to the best possible advantage.

The judicial system has embarked on several new efforts to provide the citizens of Massachusetts with justice which is neither delayed nor denied.

It is also to be noted that employees of the judicial department are now embraced within the scope of collective bargaining for public employees under G.L. Chapter 150E as amended by Chapter 478 of the Acts of 1978.

3. Continuing Study of the Judicial System

In this 54th Report of the Judicial Council, we do not dwell on the past, but look forward to the problems of the future.

In no system of jurisprudence known since the world began has perfection been achieved. We are not so naive as to suppose that the enactment of the "Courts-Consolidation" Act of 1978 is a solution to the difficult problems of providing the machinery of justice in a complex society.

It would be naive to assume that the enactment of the "Courts-Consolidation" Act of 1978 will provide the judicial machinery to reach a just solution to the myriad and complex problems that constantly arise in a modern society.

Since the beginning of time, it is doubtful that any society achieved a system of jurisprudence that approached perfection.

Yet, we must continue to strive toward that goal. We must continue to diagnose our infirmities. There are hardships and injustices. There are gaps to be filled and ambiguities to be cleared.

B. Statistics

We call to the attention of the General Court the necessity for the production of timely and detailed statistical data regarding the administration of the trial courts and the appellate courts; court work accomplished; the work yet to be performed; and the financial effectiveness of the structure presently in operation.

In our Annual Reports for 1976 and 1977, we were able to analyze and present to the General Court certain statistical indicators in the field of judicial administration.

With the introduction of the consolidation of the trial courts, and the elimination of the office of the Executive Secretary of the Supreme Judicial Court, except for the Probate and Family Court Department, we found it extremely difficult to obtain current statistics on the operation of the courts, especially the trial courts.

We hope that such statistical interpretations will be available so that in our next report we may be able to make appropriate comment in regard thereto.

C. Court Buildings Survey

On or before June 30, 1980 a commission appointed by the Chief Administrative Justice is required to file a report on the status of all buildings operated by the judicial department.

A comprehensive study of the court facilities and buildings of the Commonwealth was completed in September, 1975, by the National Center for State Courts; a separate study of the Suffolk County courthouse by Space Management Complex, Inc. was completed in 1974. These multi-volume detailed studies have already demonstrated that there are major deficiencies in existing facilities for the courts. In our 51st Annual Report for 1975, we drew attention to certain conclusions suggested by these studies.

On the basis of the existing studies in 1975, we noted the following deficiencies in court facilities:

- | | |
|----------------------------------|-----|
| 1. Overcrowding | 35% |
| 2. Poor Acoustics and Noise..... | 35% |
| 3. Poor Lighting..... | 32% |

Among other things, we noted that the Chelsea and Winchendon District Courts should be relocated in other buildings.

4. Inadequate Electricity.....	9%
5. Poor Appearance.....	7%
6. Leakage — Water Damage.....	7%
7. Fire Hazards.....	5%
8. Inadequate Heating.....	5%
9. Inadequate Parking.....	3%
10. Poor Structural Condition.....	1%

As to general condition:

Superior and Probate Court

Good	25%
Fair	50%
Poor	25%

District Courts

Good	45%
Fair	37%
Poor	18%

We again recommend uniform design standards for court facilities. Now that the operation of the judicial system has passed out of the sphere of strictly local concern, it should be more feasible for the court administration to establish sound policy for new and renovated facilities.

D. Facilities for Jury Trials in Divisions of the District Court Department

The new procedure for jury trials in the District Court Department under G.L. Chapter 278, sections 17-25, as amended by Chapter 478 of the Acts of 1978, became effective on January 1, 1979.

Jury of Six sessions have been held at certain locations in the District Court Department for several years, but the new procedure which eliminated de novo appeals to the Superior Court may develop space and facilities problems which cannot yet be fully appreciated and provided for which we have yet to provide.

These Jury of Six trials will be held at 19 central locations in the District Court Department. We would discourage any immediate steps to provide jury facilities in other district courts. Final action or

any new or substantially renovated court facilities in the District Courts and the Municipal Court should probably await the accumulation of experience with the new Jury of Six procedure in criminal cases.

E. Juvenile Appeals Session

As now provided in the court reorganization act of 1978, a juvenile adjudicated delinquent and certain others may appeal for a trial by a Jury of Six in the appropriate division and sessions of the Juvenile or District Court Departments. We cannot now determine whether this procedure will require any additional or improved facilities.

F. The Cost of Improvement to Facilities

It will be necessary to establish priorities for any improvements in court buildings and facilities in view of the tremendous demands from every governmental agency for more tax dollars to effectively perform its mission. If the reorganized judicial system is to operate with effectiveness, the General Court should give serious consideration to the needs of the system as a whole, with special emphasis on the strengthening of its weakest links.

G. Leases and Acquisition of Court Buildings

Under G.L. Chapter 29, section 4, it is the duty of the Chief Administrative Justice, subject to the approval of the Chief Justice of the Supreme Judicial Court to negotiate leases between the judicial branch and other parties for court facilities.

It is now provided in G.L. Chapter 29A, section 5 that the Chief Justice of the Supreme Judicial Court may, upon the recommendation of the Chief Administrative Justice of the trial court, recommend to the General Court that buildings owned by the county, city or town be acquired by the Commonwealth.

We know of no present staff support within the judicial branch which will enable it to deal adequately with questions of fair market value of such properties or the estimation of the costs of maintenance, repair and necessary operating expenses, or with the successful negotiation of complex leaseholds.

The management of court facilities, court buildings and the operation thereof, is an operation which entails great expense.

A program which will enable the Chief Administrative Justice to have the benefit of expert consulting services in this area, we suggest, one which a high order of priority should be assigned.

Admittedly, such a program necessarily entails substantial costs. However, it appears to us that sound business judgment requires the advice of professional real estate consultants and such other professional maintenance outfits, etc. The benefit resulting from such assistance should result in such long term savings that would far exceed the original expense.

H. Retired Justices

The "Courts-Consolidation" Act, Chapter 478 of 1978 makes specific provisions for the use of retired justices subject to the approval of the Chief Justice of the Supreme Judicial Court.

Amendments to G.L. Chapter 32, sections 65E to 65G now provide that a retired justice or chief justice may be approved for a two year term and that there may be reapprovals for successive two year periods.

We note that there is dialogue between the bar associations and the office of the Chief Justice of the Supreme Judicial Court concerning the approval of service by retired justices for extended periods.

It is appropriate that the views of the bar be made known to the Chief Justice of the Supreme Judicial Court in this connection.

I. Administration of Justice Under Emergency Conditions

In 1950, by Chapter 639 of the Acts of 1950, the "Civil Defense Act" (a special law) as amended by Chapter 579, section 5 of the Acts of 1978, there were provisions made for the operation of a judicial system during a state of emergency.

A "state of emergency" may be declared by the Governor after federal action is taken, the event of a war situation or a disaster or catastrophe from drought, fire, flood, earthquake or other natural causes. A "state of emergency" may also be proclaimed (as was done in the February 1978 Blizzard) when the Governor determines that by reason of one of the foregoing, the health, safety or property of the citizens will be endangered because of fire or shortage of water or food.

This special civil defense legislation has now been amended to per-

mit flexibility of operations by the consolidated trial court, in all its departments in the event of emergency.

We again call attention to the lack of a Judicial Succession Act which would provide for emergency judges in a severe disaster situation.

A constitutional amendment was discussed in 1960 and by virtue of Chapter 38 of the Resolves of 1960, the Judicial Council made a report (43rd Annual Report, pp. 38-47) on this question.

The Court-Consolidation Act does not provide for judicial officers in case of a major disaster in which many judges might be victims.

We have no effective legislation for a standby judiciary.

J. Zoning Appeals

G.L. Chapter 40A, section 17 has been amended so as to permit the trial of zoning appeals in the District Court Department. There are special provisions for Hampden County.

We continue to express concern that this type of case may, by the complexities involved in many instances, tend to clog the orderly flow of District Court Department business.

It is to be noted that any party to such appeals may claim a trial in the Superior Court Department.

K. Uniform Traffic Citations (Non-Criminal)

By an amendment to G.L. Chapter 90, section 20F, an enforcement officer may issue a "CITATION" to any person who violates provisions of G.L. Chapters 85 to 90D where the maximum statutory penalty does not exceed \$100.00.

It is hoped that this new procedure of "de-criminalizing" traffic violations under Chapter 90, sections 20A and 20C (excluding parking offenses already "de-criminalized") will ease the judicial burden in the District Court Department of the trial court.

In a recent year, there were over 600,000 criminal entries in the District Court Department. At least one-half of these probably fall into the category now covered by the new UNIFORM TRAFFIC CITATION.

There has been considerable criticism of this new procedure.

The law has been interpreted by some judges to deny to the police officer the authority to make an arrest in cases where a vehicle

operator fails or refuses to produce a license and registration even under the most suspicious circumstances, and in many other cases. We do not concur in such interpretations.

We note here that many crimes have been detected as a result of the proper investigation of traffic violations.

It is expected that during the 1979 session, the General Court will give its attention to the deficiencies of the new section F of Chapter 90. Revisions of this section are in order so that the legislative intent can be achieved.

L. Consumer Actions

We comment on various proposals to amend G.L. Chapter 93A (Consumer Protection) elsewhere in this Report.

Sections 3A and 11 of Chapter 93A have recently been amended so as to permit consumer claims for *money damages only* to be brought in the District Court Department.

We had so recommended in our Special Report in 1977.

There are some who believe that equitable relief should be available in consumer claims (and also in certain landlord-tenant cases) in the District Court Department. We continue to believe that equitable relief is largely a matter for the Superior Court Department.

M. Judicial System Budget

In accordance with G.L. Chapter 211, section 2A it is the responsibility of the Chief Justice of the Supreme Judicial Court to prepare and submit to the budget director "an estimate for the ordinary maintenance of the entire judicial system of the Commonwealth and the revenue therefrom".

It is the obligation of the Chief Justice of the Supreme Judicial Court to make such budget recommendation as he may desire.

In the preparation of this budget, the Chief Justice of the Supreme Judicial Court "*may*" use the estimates which this statute requires to be forwarded to him by the Chief Justice of the Appeals Court and the Chief Administrative Justice of the trial court.

In the budget process, there will be a requirement for input at every level.

The Administrative Justice of each of the Trial Court Departments (Superior, Housing, Land, Probate and District Courts) will participate in this budget process and it is inevitable that questions of priority will arise.

In an economy which faces serious inflation and progressively increasing costs for personal services, and in an area where the need for improvements to physical facilities is apparent, we anticipate substantial competition regarding the allocation of available funds.

Perhaps the Chief Justice of the Supreme Judicial Court may deem it advisable to convene conferences of judges and members of the bar under the provisions of G.L. Chapter 211, section 3B as amended to deal with problems arising out of the necessity to allocate available funding among equally meritorious programs within the system.

N. Trial Court Assignments

Under the authority of G.L. Chapter 211B, section 9 it is provided that the Chief Administrative Justice of the Trial Court may assign a justice appointed to any department of the trial court to sit in *any* other department of the court for such period or periods of time as he deems will best promote the *speedy dispatch* of judicial business.

The authority for such assignments is restricted by statute in the following respects:

- (i) The preferences of each justice as to which department such justice desires to serve must be ascertained.
- (ii) If a justice is aggrieved by his assignment, such justice may appeal the order to the Supreme Judicial Court which shall determine the matter.
- (iii) A justice so assigned may in effect seek a review of the order of the Chief Administrative Justice on the basis that an assignment "impairs" the orderly operation of his department of the trial court.

In addition to these three specific provisions, the Chief Administrative Justice is required to make assignments consistent with the effective operation and dispatch of business in each department of the trial court.

In its Special Report in 1977 and in its 53rd Annual Report, the Judicial Council expressed particular concern as to the unrestricted transfer of judges from one court to another.

The assignment of district court justices in the Superior Court Department did not always work out well. The Judicial Council was also mindful of the wealth of experience that judges of specialized courts had in their particular fields.

Such concentration of effort did not *sua sponte* necessarily qualify

the individual for entirely new or different judicial responsibilities.

It is often urged by proponents of the several varieties of "unification" of the trial courts in various states of the nation that unrestricted assignment authority over trial justices made the courts more "flexible."

While it is fairly apparent that inflexibility is no goal, it does not follow that flexibility is necessarily the ultimate goal of judicial administration. Knowledge and experience in the particular field is of even greater importance.

With the restrictions that are now contained in section 9 of Chapter 211, we feel quite certain that the exercise of the authority to assign justices to any department or division of the trial court will not be prejudicial to the standards which we have championed.

It is also now possible for some justices who seek broader judicial experience, and can be spared by their department, to request an assignment, subject to the statutory safeguards, to another court.

In no case would it be appropriate if the case load in one department or division were to stagnate so that judicial business elsewhere could be more expeditiously transacted. Consideration should be given to permitting the transfer of *cases* between departments more broadly than is now possible.

It is, of course, the obligation of the Chief Administrative Justice, in conference with the affected Administrative Justices, to make these decisions.

O. Commission on Judicial Conduct

After much discussion over the past few years, the General Court included a "Commission on Judicial Conduct" in the court consolidation statute.

This new commission is the creation of the legislative branch and is authorized by G.L. Chapter 211B.

The Judicial Council has prepared several recommendations and reports which pertain to the creation of an agency to deal with judicial misconduct.

When Chapter 211B is analyzed, it becomes apparent that upon completion of an investigation of alleged misconduct by a judge, the commission "shall recommend an appropriate disposition of the matter under investigation" (and state its reasons) to the Supreme Judicial Court.

The function of such a commission in the past has been fulfilled by special counsel acting in particular cases.

The new commission is comprised of three judges, three members of the bar, and three citizens who are neither judges nor lawyers.

We have recently seen that the removal of a judge may, by virtue of the constitution of this Commonwealth, become imbued with "political" overtones and not be primarily a judicial decision.

There may be merit to the existence of a permanent commission on judicial conduct acting under a statute which alters nothing so far as the Massachusetts constitution is concerned.

It is a recently demonstrated fact that a judge may be removed from his office merely by the majority vote of the house, the senate and the Governor's Council, and the approval of the Governor.

The failure of the commission to recommend a sanction in no way prevents the process of removal by address, nor does the action or inaction of the commission necessarily stay the hand of the Supreme Judicial Court.

It is assumed that both the Supreme Judicial Court and the General Court will await the recommendation of the Judicial Conduct Commission before any action is taken in the ordinary case. To this extent, the commission will be useful.

Despite all claims to the contrary, the issue of judicial discipline, except in a case of small consequence, is an issue of constitutional concern.

The people, acting through elected representatives, with or without proof of actual wrongdoing by a judge, may bring about the removal of that judicial officer when their confidence in him is lost.

The new commission will serve a limited function. The problem of judicial discipline and ultimate removal is not one that can ever be delegated by the General Court to any commission or to the judicial establishment. As a matter of constitutional law, the judicial branch is not the final arbiter in this kind of case.

The preliminary investigative work has now been delegated, but the press is unlikely to permit such proceedings to take place behind closed doors and may be depended upon to conduct its own search for the truth. A related problem which must be addressed is whether the proceedings before the commission should continue to be confidential. On the one hand, there is danger that publication of every complaint will undermine confidence in the judicial branch, given the experience that vindication is rarely newsworthy. On the other hand, the press and the public tend to be suspicious of closed proceedings.

The middle ground, rumors and leaks, is less satisfactory than addressing this problem.

It is to be expected that persons who are dissatisfied with the decision of a judge will voice their complaints to any one who will lend a listening ear. The complaint may well be totally unfounded, it may be a situation where the law itself has produced a harsh result on a particular person or his property. Persons convicted of a crime and their families and friends are critical of the judge by the very nature of the situation. If a judge must sentence a person to incarceration, that judge is the focal point of the frustration of family and friends and the anger of the person so sentenced.

If a judge is subjected to a complaint, even if it is unfounded, the judge must retain his own private counsel and is required to pay the fees and expense of legal counsel in such cases. More often than not, the complaint is dismissed and the matter is closed by the appropriate authority.

In the case of long standing matters, it is possible that a complaint will be made about something that happened in court many months, or even years, before the matter reaches a commission or investigator. In a significant number of instances, there was no recording device in operation at the critical time or no stenographic transcript. With the great pressure of business in a criminal session, it is to be expected that a judge will have little or no memory of a specific case interspersed among many other similar cases. In these circumstances the only reconstruction of the events must be from the very limited information on the court records and documents.

These problems are very real and deserve attention. While a citizen should have a forum for complaints about judicial misconduct, the judge is entitled to full and fair consideration also, and is entitled to have the complaint fully and plainly stated so that the accuser and his motives can be confronted. No citizen deserves less.

P. Special Justices

After July 1, 1979, the office of special justice of the District Court Department is virtually abolished. On or before that date, any special justice must have elected to give up the practice of law and to serve full time.

Q. Trial De Novo in Criminal Cases

In our study of de novo appeals in our 53rd Report, we noted some recent statistics:

<i>Criminal Cases</i>	<i>1975</i>	<i>1976</i>
Appeals From District Court to Superior Court for Criminal Trial De Novo	33,566	40,263
Actual Disposition by Trial	1,521	1,425

After January 1, 1979 and under the provisions of G.L. Chapter 218, section 27A every division of the District Court Department is authorized to hold Jury of Six sessions for the hearing of criminal cases which are within the final jurisdiction of the district court.

In lieu of the customary criminal procedure in the district court divisions, the following format is established:

1. Defendant will be tried by a Jury of Six.
2. A defendant may sign a waiver consenting to a trial by the judge alone, subject to a right of appeal for a de novo trial by a Jury of Six and another judge.
3. On a de novo jury trial, the procedures applicable to jury trials in Superior Court apply; except that only two challenges are allowed to each defendant.
4. Defendant may appeal for judicial review by the appellate courts.

During the discussion of the most recent court consolidation legislation, the Judicial Council took the position that the assignment to the District Court Department of the task of conducting Jury of Six trials in all criminal cases within the District Court, coupled with the recent expansion of the work of the District Courts in other areas, might prove to be too much of a burden for those courts and cause a clogging of the dockets. The decriminalization of certain motor vehicle violations and the use of magistrates to perform some of the minor judicial functions should help free the justices for strictly judicial duties.

We deem it advisable to review this situation after this procedure is in operation for a reasonable period. We intend to closely monitor the de novo appeal situation and to advise the General Court as to our observations on the new procedures. We will also plan to concern

ourselves with the expected beneficial effect of this new District Court assignment on the work of the Superior Court Department.

R. Magistrates

To lessen the work load of the judge, the "Courts-Consolidation" Act provides by Chapter 221, sections 62B and 62C that certain clerks and assistant clerks shall be:

MAGISTRATES IN THE TRIAL COURT

with additional powers to:

- a. grant continuances agreed upon;
- b. hear and rule on non-evidentiary motions;
- c. call pre-trial conferences;
- d. mediate actions under Chapter 218, section 22;
- e. receive citations and hear complaints;
- f. receive petitions and review orders under Chapter 140, section 157 (dog cases);
- g. hold preliminary hearings on probation violations.

These powers are subject to court rules promulgated by the Administrative Justice and approved by the Supreme Judicial Court. At this writing, rules have yet to be implemented and we cannot determine how effective these provisions will prove to be.

S. Remand Cases — \$7,500

By amendment to G.L. Chapter 231, sections 102C and 104 it is now provided that cases in which there is no reasonable likelihood that the recovery will exceed \$7,500 must first be tried, without jury, in the District Court Department and be summoned there for trial if entered in the Superior Court Department. The right to a re-transfer and jury trial is preserved.

T. Special Studies Mandated by Chapter 478 of the Acts of 1978

1. Probation

A Legislative Committee on the Probation System is required to report to the legislature at the end of December, 1979.

2. Jurisdictional Lines

A Legislative Committee to redraw jurisdictional lines of District and Probate Courts is to report to the House of Representatives by June 30, 1979.

3. Court Fees

The Supreme Judicial Court is to file a report by June 30, 1979 with the House and Senate covering:

- a. present structure of fees charged with total receipts in each category, the grand total, and the disposition of such funds;
- b. present standards of indigency by which a decision to waive fees is reached, together with the amount of fees so waived;
- c. fee structure in other states;
- d. new fee schedule to more nearly reflect the actual cost of service, and the charges made for similar services elsewhere.

Revision is long overdue. A divorce action may be entered in the Probate and Family Court for \$35.00 and the Superior Court for \$5.00.

4. Committee on Criminal Justice

Under G.L. Chapter 6, section 156, the Committee on Criminal Justice, which includes one representative of the Judicial Council is required to meet at least four times each year.

The purpose of this committee, according to the statute is

to advise the governor on all phases of the adult and juvenile systems of law enforcement and criminal justice in the commonwealth; develop and revise a comprehensive law enforcement and criminal justice plan. . . . etc.

While this committee has been used in the past to allocate LEAA grants, (as it is required to do under the statute) we do not know of any recent developments in the area of a "comprehensive criminal justice plan."

U. The Appeals Court

Chapter 211A of the General Laws established an intermediate appellate court for the Commonwealth. The legislation was intended to help reduce the backlog of cases facing the Supreme Judicial Court

of Massachusetts. Since the establishment of the Appeals Court in 1972, however, the number of appellate entries has skyrocketed.

During the court year ending August 31, 1972, which was the last full court year before the Appeals Court began to function, there were 421 appellate entries in the Supreme Judicial Court.

During the court year which ended August 31, 1978, the total number of direct appellate entries in the Appeals Court and the Supreme Judicial Court, combined, was 1,211.

It appears that while the total appellate case load has tripled, the total number of appellate judges (from seven in 1972 to the present seventeen) has not.

In an attempt to relieve the appellate backlog, Chapter 478, Section 104, of the Statutes of 1978 was enacted. That legislation authorized the appointment of four additional justices sorely needed by the Appeals Court. It is hoped that these additional justices will help ease the pressure on the Appeals Court, assuring quality judicial review to the citizens of the Commonwealth.

The addition of four new justices is, however, only a stop-gap solution. The increase in the number of cases reaching both the Appeals Court and the Supreme Judicial Court shows no sign of abating. The greatest unknown quantity affecting the backlog is the number of appeals which will result from convictions by juries-of-six, by reason of the provisions of Chapter 218, Section 27A(g) of the General Laws. A further expansion of the Appeals Court may be necessary in the not distant future.

Even with the new juries-of-six, which should reduce the number of appeals to the Superior Court Department, the Superior Court still will carry a heavy burden. The civil side of the court is in special need of assistance. The appointment of ten additional Superior Court justices as authorized by Chapter 478, Section 116, of the Statutes of 1978 should help to halt the increase in the backlog of civil cases. It does appear, however, that for most of our plaintiff citizens the wait before the court will be all too long. A further increase in the number of Superior Court justices is necessary if the Superior Court Department is ever to run efficiently and the huge court backlog be reduced.

II. WORKMEN'S COMPENSATION COVERAGE — ALTERNATIVE SENTENCING

A. Limiting Liability for Injuries or Death of Participants In Lieu of Sentencing

SENATE (1978) No. 708

AN ACT LIMITING THE LIABILITY FOR PERSONAL INJURIES OR DEATH
SUFFERED BY A DEFENDANT WHILE PARTICIPATING IN A PROGRAM
IN LIEU OF A SENTENCE FOR CERTAIN VIOLATIONS OF LAW.

*Be it enacted by the Senate and House of Representatives in General
Court assembled, and by the authority of the same, as follows:*

1 Chapter 276 of the General Laws is hereby amended by
2 adding the following section: —
3 *Section 104.* Any person, whether a juvenile or an adult, or
4 the legal representative of such person who is charged as a de-
5 fendant with an offense or offenses against the commonwealth
6 may, if permitted by the court having jurisdiction of such of-
7 fense or offenses, consent to being placed on probation, with a
8 stay of proceedings, a continuance without a finding or, after
9 a finding by the court, a condition of which probation being
10 that said defendant performs certain work or participates in
11 certain community services for a stated period of time, either
12 by a special order of the court having said jurisdiction or un-
13 der the provisions of chapter two hundred and seventy-six A.
14 Said defendant shall, while engaged in such performance or
15 participation, be considered an “employee” of the common-
16 wealth, as defined in section one of the chapter one hundred and
17 fifty-two, and entitled to all the benefits of said chapter, and
18 shall be entitled to compensation thereunder. In the event
19 that a defendant suffers personal injury or death arising out
20 of or in the course of said performance or said participation,
21 the employer or the community service organization for whom
22 or for which said defendant so worked or so participated, shall
23 be required to provide the attorney general’s office and the di-
24 vision of industrial accidents the information required as to
25 each such defendant under the provisions of said chapter one
26 hundred and fifty-two. Said defendant shall, at the time of his

27 initial consent, waive in writing any and all rights of action
28 based on claims for personal injury or death arising out of or
29 in the course of said employment or participation, except his
30 said rights under said chapter one hundred and fifty-two
31 granted herein, against the court which granted said probation,
32 the officers and personnel supervising said probation, and the
33 employer or community service organization for whom or for
34 which said defendant so worked or so participated.

We recommend Senate No. 708.*

1. Definition of Employee

As provided by General Laws Chapter 152, Section 25A, every employer (except cases of work done for owners of residential dwellings with less than three apartments) must provide medical expense and compensation protection (usually an insurance contract) for every employee. Some other exceptions are made which are not relevant here.

The term "employee" is defined in General Laws Chapter 152, Section 1(4) and covers every person in the service of another under any contract of hire, express or implied, oral or written.

Under General Laws Chapter 152, Section 26 certain persons may be conclusively presumed to be the employees of another under given circumstances.

When a person in the service of another is injured, there is sound reason for the "master" to be concerned if workmen's compensation insurance or equivalent protection under General Laws Chapter 152, Section 25A has not been provided. This concern would lead many to obtain the insurance, but the legal question of employee status may still be unresolved.

The premium payable by the employer on workmen's compensation coverage is based on several factors among which is the total payroll, the hazards of the job, and the loss experience of the employer.

This statutory protection is one of the many high costs of doing business.

2. Contract of Hire

In 1940, in the *George Scordis* Case, 305 Mass. 94, it was held that a welfare recipient who performed services on an ash truck of the City of Woburn was not covered by the Woburn workmen's compen-

Similar legislation has been filed for the 1979 session of the General Court as House No. 1396.

sation policy when he broke his leg on a job related accident.

The court found that Scordis was *not* an employee because the service was not voluntary on the part of Scordis and that the arrangement was by virtue of an obligation placed on the employer city by legislative mandate rather than under a *contract of hire*, "express or implied, oral or written."

It was argued that Scordis was under the "direction and control" of the employer, but this was not held sufficient to warrant the finding of a contract for hire.

A similar situation was found in *Greene's Case*, 280 Mass. 506 (1932) where a prisoner in the Charles Street Jail, assigned to work on a sewer did *not* entitle him to workmen's compensation as there was no contract of hire, "express or implied, oral or written."

3. Existing Work Release Programs

Under General Laws Chapter 127, Section 86F, County Sheriffs may establish "work release" programs under which inmates (except sex offenders) may be released "for the purpose of working at gainful employment" under controlled conditions.

The "take home pay" of such inmates is delivered to the sheriff who deducts the costs of county support, any court ordered family support and any family allotments or agreed deductions.

Employers who are willing to take on such persons in a work release program would likely be held to be employers as defined in Chapter 152. The reasoning of the *Scordis* case may not now be persuasive. In any event, the relationship between the participant in the work release program and his "employer" is one where there seems to be a contract of hire, freely entered into, and the inmate is subject to the direction and control of his "employer."

4. Rehabilitation to be Encouraged

Programs such as "Work Release" have always been encouraged by the Judicial Council and by citizens of the Commonwealth who are willing to accept inmates of the county correction system as workers deserving reasonable additional consideration from the Commonwealth.

At this juncture, it would appear that such employers would be greatly concerned with the necessity for and the cost of workmen's compensation insurance. Some may be reluctant to participate in the

work release program because of costs, problems, or uncertainties with respect to coverage under General Laws Chapter 152.

Under present law it would be difficult to find that a prisoner in a work release program, paid by a private employer, and probably having made a "contract of hire" *with the private employer* could ever make a successful workmen's compensation claim against the Commonwealth. The prisoner has no "contract of hire" with the Commonwealth of Massachusetts or the county under any reasonably foreseeable circumstances.

5. "Community Service"

This bill does not cover "Work Release" under General Laws Chapter 127, Section 86F, and perhaps it should, but it would confer on all juvenile and adult offenders who are performing "certain community services", under some arrangement ordered by or approved by the court, the status of an "employee" of the Commonwealth.

The bill anticipates that at least some of these services will be for a private employer or a "community service organization". It is possible that the "employer" in some cases might be a city, town, county or other agency of government.

If such persons are legally made employees of the Commonwealth by an act of the General Court, we presume that the lack of a "contract of hire" by the Commonwealth would be overcome.

It is obvious that the assumption of financial risk by the Commonwealth in such cases will result in a predictable additional cost to the taxpayer. If, on the other hand, the constructive and rehabilitative goal of "community service", as a sentencing alternative, can be achieved, the long term benefits to the Commonwealth will exceed the costs, even though in some serious injury cases these costs will be very high.

III. SPECIAL GUARDIANSHIP

- A. Problems of Elderly and Disabled Persons
- B. Special “Guardians”
- C. Costs of Program
- D. Recommendation

A. Problems of Elderly and Disabled Persons

SENATE (1978) No. 1504

AN ACT PROVIDING FOR THE APPOINTMENT OF GUARDIANS OF ADULTS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 The General Laws are hereby amended by striking out
2 chapter 201 and inserting in place thereof the following
3 chapter:—

4 CHAPTER 201
5 GUARDIANS

6 Section 1. Probate court; power over appointment

7 a. The probate court may, if it appears necessary or con-
8 venient, appoint a guardian of a minor inhabitant of or resi-
9 dent in the county, or resident outside the commonwealth
10 having estate within the county.

11 b. The probate court may, if it is necessary, appoint a
12 guardian of an adult inhabitant of or resident in the county,
13 or resident outside the commonwealth having estate within
14 the county.

15 Section 2. Power of Attorney

16 a. The death, incapacity or other disability recognized
17 under the General Laws, of any principal who has executed
18 a power of attorney in writing shall not revoke or terminate
19 the agency as to the attorney in fact, agent or other person
20 who, without actual knowledge of the death, incapacity or

21 other disability of the principal, shall act in good faith under
22 the power of attorney or agency. Any action so taken unless
23 otherwise invalid or unenforceable, shall bind the principal
24 and his heirs, devisees, and personal representatives. An
25 affidavit, executed by the attorney in fact or agent stating
26 that he did not have, at the time of doing an act pursuant to
27 the power of attorney, actual knowledge of the revocation or
28 termination of the power of attorney by death, incapacity or
29 other disability, and signed under the penalties of perjury,
30 shall, in the absence of fraud, be conclusive proof of the non-
31 revocation or nontermination of the power at that time. If the
32 exercise of power shall require execution and delivery of any
33 instrument which is recordable, the affidavit when authenti-
34 cated for record shall likewise be recordable. This subsection
35 shall not be construed to alter or affect any provision for
36 revocation or termination contained in the power of attorney.

37 b. Whenever a principal designates his attorney in fact or
38 agent by a power of attorney in writing and the writing con-
39 tains the words "This power of attorney shall not be affected
40 by incapacity of the principal," or "This power of attorney
41 shall become effective upon the incapacity of the principal,"
42 or similar words showing the intent of the principal that the
43 authority conferred shall be exercisable notwithstanding the
44 principal's incapacity, the authority conferred shall be exer-
45 cisable on behalf of the principal as provided in the power of
46 attorney, notwithstanding later incapacity of the principal.
47 Notwithstanding the principal's later incapacity, the principal
48 may revoke or amend the power of attorney if the court has
49 not granted that power to a guardian under section 15.

50

GUARDIAN OF A MINOR

51

Section 3. Appointment

52 If a minor is under fourteen the probate court may nomi-
53 nate and appoint his guardian. If he is above the age he may
54 nominate his own guardian, who, if approved by the court,
55 shall be appointed accordingly. Such nomination may be made
56 before a justice of the peace, notary public or city or town
57 clerk within the commonwealth who shall certify the fact to
58 the probate court. Upon the filing of a petition for the appoint-
59 ment of a guardian under this section, the court shall appoint

60 a time and place for a hearing, and shall cause not less than
61 seven days' notice thereof to be given to the mother and
62 father of said minor, if living, unless they have assented to
63 the filing of said petition; otherwise notice shall be given to
64 the nearest relatives of full age, and if there are no known
65 relatives within the commonwealth notice shall be given by
66 publication as directed by the court. If the person nominated
67 is not approved by the court, or if the minor resides out of
68 the commonwealth, or if the minor after being cited neglects
69 to nominate a suitable person, the court may nominate and
70 appoint his guardian in the same manner as if he were under
71 fourteen. If the minor is married no guardian shall be ap-
72 pointed without such notice to the spouse as the court may
73 order. In the matter of said appointment and all subsequent
74 proceedings relating thereto, the United States veterans'
75 bureau or its successor shall be deemed to be a party in
76 interest and shall receive such notice as the court may order,
77 if the ward or proposed ward is entitled to any benefit, estate
78 or income paid or payable by or through said bureau or its
79 successor.

80 *Section 4. Testamentary guardian*

81 A father or mother may by will appoint a guardian for a
82 minor child, whether born at the time of making the will or
83 afterward, to continue during minority or for a less time,
84 effective when the guardian accepts appointment by filing his
85 bond in acceptable form except that if a guardian has already
86 been appointed, whether testamentary or otherwise, a later
87 testamentary appointment shall become effective only when
88 approved by the court. A testamentary guardian appointed
89 by will of a parent shall have the same powers and perform
90 the same duties relative to the property of the ward, and, if
91 the other parent is not living, relative to the person of the
92 ward, as a guardian appointed under section two. If applica-
93 tion is made to the probate court for approval of the appoint-
94 ment of a testamentary guardian after the appointment of a
95 guardian, whether testamentary or otherwise, has become
96 effective, notice of such application shall be given to such
97 previous guardian, and thereafter the court may remove such
98 previous guardian and approve the appointment in his place
99 of the person applying for approval of appointment as testa-

mentary guardian or it may appoint any other suitable person,
or it may approve the appointment of the person making such
application to serve as guardian with the guardian already in
office.

Section 5. Powers

The guardian of a minor unless sooner discharged according
to law shall continue in office until the minor attains the age
of eighteen years and shall have the care and management of
his estate.

Section 6. Custody and Education of Minor, Effect of Marriage

The guardian of a minor shall have the custody of his
person and the care of his education, except that the parents
of the minor, jointly, or the surviving parent shall have such
custody and said care unless the court otherwise orders. The
probate court may, upon the written consent of the parents
or surviving parent, order that the guardian shall have such
custody; and may so order if, upon a hearing and after such
notice to the parents or surviving parent as it may order, it
finds such parents, jointly, or the surviving parent, unfit to
have such custody; or if it finds one of them unfit therefor
and the other files in court his or her written consent to such
order. The marriage of a minor shall deprive the guardian of
all right to custody and education, but not of the care and
possession of the minor's property. If a corporation is ap-
pointed guardian of a minor, the court may, subject to the
right of his parents, or of the spouse of a married minor, as
provided in this section, award the custody to some suitable
person.

Section 7. Temporary Guardian of a Minor; Powers and Duties

Upon the petition of a mayor or the selectmen, the depart-
ment of public welfare, the department of mental health, or
other person in interest, the court may, if it finds that the
welfare of a minor requires the immediate appointment of a
temporary guardian of his person and estate, appoint a
temporary guardian of such minor, with or without notice,

137 and may in like manner remove or discharge him or terminate
138 the trust. A temporary guardian of a minor shall, until other-
139 wise ordered, or until his removal or the appointment of a
140 permanent guardian, have the same powers and duties relative
141 to the person and estate of the ward as permanent guardians
142 and may be decreed the custody of the person of a minor, if
143 the court finds the parent or parents unfit therefor or if it
144 finds one of them unfit therefor and the other consents to such
145 custody by the temporary guardian or if a temporary guardian
146 is serving or appointed to serve in place of a temporary
147 guardian removed. If such temporary guardian of a minor is
148 appointed pending proceedings for an order for custody under
149 section six or for the removal of a guardian of a minor, he
150 shall have the sole custody and control of the ward during
151 the pendency of such proceedings. Upon the termination of
152 his powers, a temporary guardian shall deliver to the guardian
153 or such person as is otherwise lawfully authorized to receive
154 it the estate of the ward in his hands. A guardian may be
155 admitted to prosecute an action commenced by a temporary
156 guardian.

157 GUARDIAN OF AN ADULT

158 *Section 8. Definitions; Clarificaton*

159 a. "Incapacity" means a condition in which an adult faces
160 significant harm to person or property because the adult bases
161 decisions on delusions or hallucinations, is unable to make
162 or implement decisions, or is unable to comprehend a decision's
163 effect.

164 b. "Resource Person" means a person appointed pursuant
165 to section 11.

166 c. The legal disability of an adult ward shall extend only
167 as far as the court, under section 15, has empowered a
168 guardian to act for the ward.

169 *Section 9. Petition for Appointment*

170 a. A proposed ward, a governmental agency, a non-profit
171 corporation, or an adult, concerned for the proposed ward's
172 welfare, may petition the probate court to appoint a guardian.

173 b. The petition shall state:

174 (1) The name and address of the petitioner and the peti-
175 tioner's relationship to the proposed ward's;

- 176 (2) The name, age and address of the proposed ward;
177 (3) The name and address of the proposed guardian, if any;
178 (4) The name and address of any person, agency, or
179 corporation known to assist the proposed ward on a
180 frequent or routine basis;
181 (5) A summary of the facts which support the allegation
182 of the proposed ward's incapacity; and
183 (6) Requests for specific powers necessary to enable the
184 guardian to alleviate or eliminate the significant harm
185 caused by the incapacity.
186 c. Upon receipt of the petition, the court shall appoint a
187 resource person and schedule the proposed ward's guardian-
188 ship hearing.

189 *Section 10. Notice*

190 a. As soon as possible after the petition is filed, but at least
191 fourteen days before the guardianship hearing, the court shall
192 order served in person upon the proposed ward a copy of the
193 petition and notice stating:

- 194 (1) The date, time, and place of the proposed ward's
195 guardianship hearing;
196 (2) The name, position, employer, and phone number of
197 the resource person; and
198 (3) The following statement:

199 "At a guardianship hearing the probate court decides
200 whether you need help managing your property or
201 caring for yourself. If the court finds that you do need
202 help, it will appoint a guardian for you. After your
203 guardianship hearing on (*date of hearing*), the court
204 will state whether decisions that you now make for
205 yourself should be made by your guardian. For
206 example, your guardian (not you) may be given power
207 to decide where you should live: whether in your cur-
208 rent home, at a nursing home, or hospital. Decisions
209 concerning your medical treatment may be made by
210 your guardian. Your financial decisions may be made
211 by the guardian, a guardian might even make your
212 monthly budget if it seemed necessary. It is therefore
213 very important that you attend the guardianship
214 hearing.

215 The person named below was appointed by the court.

216 (*Resource person's name*) will soon be contacting you
217 to discuss whether it is necessary to appoint a guardian.
218 It is that person's job to help you remain as inde-
219 pendent as possible, but if he or she thinks you cannot
220 manage yourself, this will be reported to the court and
221 may influence the court to appoint a guardian for you.
222 You have a right to attend the guardianship hearing
223 and to oppose the appointment of a guardian. You
224 also have a right to be represented by an attorney.
225 If you do not know an attorney to contact, or cannot
226 afford to pay an attorney's fee, (*Resource Person*)
227 will help you get an attorney.

228 *Section 11. The Resource Person*

229 a. Upon receipt of the petition, the court shall appoint a
230 resource person. The resource person may be an employee of
231 a social service agency, a family service officer of the court,
232 or any qualified and disinterested person. The resource
233 person shall have knowledge of support services and other
234 public and private resources available to the proposed ward,
235 and the ability to advise the court how these resources may
236 alleviate or eliminate the harm faced by the proposed ward
237 and the proposed ward's need for a guardian.

238 b. The resource person shall first contact the proposed ward
239 to explain the role of resource person and to arrange an inter-
240 view with the proposed ward, preferably at the proposed
241 ward's residence. The resource person shall interview the
242 proposed ward, the petitioner, the proposed guardian, and
243 relatives, friends and agency personnel who are familiar with
244 the proposed ward's needs.

245 c. The resource person shall help the proposed ward appre-
246 ciate the importance of obtaining legal counsel. If the pro-
247 posed ward does not have counsel, the resource person shall
248 inform the proposed ward of legal assistance and referral
249 programs sponsored by the private bar and by the govern-
250 ment, and of the panel of attorneys maintained pursuant to
251 section 12. The resource person shall offer to make an appro-
252 priate referral, and shall do so as soon as requested.

253 d. Not less than seven days before the guardianship hear-
254 ing, the resource person shall file with the court and parties

255 a written report. The report shall contain a list of the names
256 and addresses of all persons contacted by the resource person
257 during the investigation of the proposed ward, and a list of
258 all available programs and services which would alleviate or
259 eliminate the significant harm faced by the proposed ward.
260 The report shall evaluate the available alternative plans and
261 describe in detail the plan which least restricts the ward's
262 rights and liberties. The report shall include all facts observed
263 by the resource person indicating that the proposed ward
264 faces significant harm, and all facts indicating the ability or
265 inability of the ward to make decisions. The report shall
266 identify or include all relevant other medical, psychological,
267 social and educational reports relating to alternative and
268 plans, the harm faced by the ward and the ability of the ward
269 to make decisions.

270 e. The resource person shall be present at the hearing and
271 available for cross-examination.

272 *Section 12. The Court-Nominated Attorney*

273 a. The Chief Judge of the Probate Court shall, with the
274 advice of state and local bar associations, maintain county-
275 wide panels of attorneys willing to be nominated pursuant to
276 this section. When the court nominates an attorney from a
277 panel it shall be by rotation.

278 b. If the court nominates an attorney from the panel the
279 county shall pay the attorney \$25 and the attorney shall
280 explain the petition and its possible consequences to the pro-
281 posed ward, advise the proposed ward of procedural rights,
282 and assist the proposed ward in deciding what to do next.
283 If the proposed ward desires, after meeting with the court-
284 nominated attorney, the court-nominated attorney may repre-
285 sent the proposed ward for a fee which is reasonable under
286 the circumstances, including the proposed ward's inability to
287 pay. The court shall review the attorney's bill and, if it finds
288 the sum reasonable, allow it to be paid by the proposed ward;
289 but if the proposed ward cannot afford to pay the full fee, the
290 court shall order the balance paid by the county. The court
291 may at any time appoint an attorney for a proposed ward or
292 ward.

293 *Section 13. The Guardianship Hearing*

294 The petitioner has the burden of proving that the proposed
295 ward has an incapacity, and that among the proposed alterna-
296 tives, a grant of the requested guardianship powers will
297 alleviate or eliminate the significant harm caused by the in-
298 capacity and will be least restrictive of the proposed ward's
299 rights and liberties. The petitioner shall also prove that the
300 proposed guardian is qualified as specified in section 16.

301 *Section 14. Written Findings*

302 a. Applying the standard of clear and convincing evidence
303 the court shall make specific written findings of the nature
304 and extent of the proposed ward's incapacity, and of available
305 programs, services and guardianship orders which would
306 alleviate or eliminate the significant harm caused by the in-
307 capacity, and of the degree restriction imposed upon the pro-
308 posed ward's rights and liberties by the available programs,
309 services and guardianship orders.

310 b. The court shall make written findings regarding the
311 qualifications as set out in section 16, of the proposed guardian
312 to perform the duties of a guardian.

313 *Section 15. Appointments and Powers of a Guardian*

314 a. If the court finds, by clear and convincing evidence, that
315 the proposed ward has an incapacity and that, among the
316 proposed alternatives the appointment of a guardian will best
317 alleviate or eliminate significant harm caused by the in-
318 capacity and is least restrictive of the proposed ward's rights
319 and liberties, the court shall appoint a guardian.

320 b. The court shall limit the powers of a guardian to those
321 necessary to enable the guardian to alleviate or eliminate the
322 harm caused by the incapacity, and to those which are least
323 restrictive of the proposed ward's rights and liberties.

324 c. A guardian may not admit or commit a ward to mental
325 health or retardation facility, or to a nursing home or other
236 chronic care facility, or authorize sterilization or abortion,
327 unless specifically empowered by the court.

328 d. The court shall state the purposes for which the
329 guardian's powers may be applied. This information shall
330 appear on the guardian's letters of appointment.

331 e. The guardian shall give the bond described in section one
332 of chapter two hundred and five.

333 *Section 16. Who May be Appointed Guardian*

334 a. Any competent person or non-profit corporation may be
335 appointed guardian. Any bank so authorized by its charter
336 may be appointed guardian with powers only over the
337 property of the incapacitated ward. However, the court shall
338 appoint as guardian only a person or organization that has
339 life experience or qualifications indicating it will competently
340 perform the duties of guardian, and that does not have any
341 interest, responsibilities or powers which would render it
342 unable to perform the duties of guardian in the best interest
343 of the ward.

344 b. Whenever a non-profit corporation or a bank is ap-
345 pointed guardian there shall be one individual employee
346 designated as an agent by the guardian with authority to
347 fulfill the duties of guardian. The name of such individual
348 shall be given to the court at the time of the appointment of
349 the guardian, and as soon as possible after any subsequent
350 change in the identity of the agent of the guardian.

351 *Section 17. Compensation; Liability of Guardian*

352 a. A guardian is entitled to reasonable compensation for
353 his services. As part of its annual review of the guardianship
354 under section 18 the court shall determine a reasonable fee
355 under the circumstances, including the ward's inability to
356 pay. If the ward cannot afford to pay the full fee, the court
357 shall order the balance paid by the county.

358 b. Unless otherwise provided in the contract, on a contract
359 properly entered into in the guardian's fiduciary capacity, a
360 guardian shall be individually liable only if the letters of
361 appointment are not presented and the ward identified in the
362 contract.

363 c. A guardian shall be individually liable for obligations or
364 torts arising in the course of the guardianship only if the
365 guardian is at fault.

366 d. The guardian shall observe the standards in dealing with
367 the property of the ward that would be observed by a prudent
368 person dealing with of his own property; and if the guardian
369 has special skills or is named guardian on the basis of repre-
370 sentations of special skills or expertise, the guardian is under
371 a duty to use those skills or expertise.

372 e. The guardian shall observe the standard of due care in
373 the fulfillment of personal obligations; and if the guardian
374 has special skills or is named guardian on the basis of repre-
375 sentations of special skills or expertise, the guardian is under
376 a duty to use those skills or expertise.

377 *Section 18. Annual Review of the Guardianship*

378 a. Within six months of the guardian's appointment and
379 annually thereafter, the guardian shall file a report for review
380 by the court or, at the court's discretion, by a resource person.
381 The report shall state:

- 382 (1) The ward's place of residence;
383 (2) A summary of actions taken by the guardian since the
384 last report;
385 (3) The guardian's opinion as to whether the ward needs
386 the guardianship to continue unchanged, or whether
387 the guardian's power should be altered;
388 (4) The guardian's record of expenses incurred in service
389 to the ward; and
390 (5) The guardian's request, if any, for reasonable compen-
391 sation.

392 b. The ward and upon request a person, corporation or
393 agency entitled to notice under section 10(b), shall be
394 delivered a copy of the guardian's report.

395 c. After the court satisfies itself that the guardian's report
396 is complete, it shall consider a request by the guardian for
397 reasonable compensation.

398 d. If a required report is not filed, the court may appoint a
399 resource person to report on the guardian's activities on
400 behalf of the ward.

401 e. A guardian or conservator appointed prior to the effect-
402 tive date of this act shall within two years commence filing
403 reports under this section.

404 *Section 19.* Alteration in a Guardian's powers; Removal
405 and Resignation of a Guardian

406 a. Upon motion of an eligible petition under section 9, or
407 on its own motion and after notice to the persons, corpora-
408 tions, and agencies entitled to notice under section 10, the
409 court may:

410 (1) Order limitations on powers granted the guardian
411 under section 15;

412 (2) Terminate the guardianship, remove the guardian and
413 appoint a successor, or accept the guardian's resignation
414 and appoint a successor; and

415 (3) Rule whether a proposed action is within the powers
416 granted the guardian under section 15.

417 b. Before ruling on a motion under subsection a, the court
418 may appoint a resource person to report in writing to the
419 court.

420 c. Upon motion of an eligible petitioner under section 9, the
421 court may, after following the procedures prescribed for the
422 appointment of a guardian, extend the guardian's powers.

423 *Section 20.* Emergency Appointment of a Guardian; Powers

424 a. The petitioner under section 9 may request emergency
425 appointment of the guardian. In addition to the requirements
426 of section 9, the petitioner shall support the request under this
427 section by presenting under oath to the court facts which
428 show:

429 (1) That the proposed ward has an incapacity;

430 (2) That due to the incapacity the proposed ward faces
431 immediate risk of irreparable and serious financial loss
432 or serious personal harm; and

433 (3) That good faith efforts were made to contact the per-
434 son, agencies, and corporations entitled to notice under
435 section 10.

436 b. If the court finds reasonable cause to believe that the
437 proposed ward has an incapacity, and that, due to the in-
438 capacity, the proposed ward faces immediate risk of irrepar-
439 able and serious financial loss or serious personal harm, the
440 court may appoint an emergency guardian to serve up to
441 seven days. The court shall limit the emergency guardian's
442 powers to those powers necessary to meet the emergency.

443 c. Within seven days of the appointment of an emergency
444 guardian under subsection b, and after notice to the persons,
445 agencies and corporations entitled to notice under section 10,
446 the court shall hold a hearing confined to the issue of the
447 need for continuing the emergency guardianship. If the court
448 finds clear and convincing evidence that the proposed ward
449 has an incapacity, and that due to the incapacity, the proposed
450 ward faces immediate risk of irreparable and serious financial
451 loss or serious personal harm, the court may appoint an emer-
452 gency guardian to serve pending a decision on the petition
453 filed under section 9. The court shall limit the emergency
454 guardian's powers to those powers necessary to meet the
455 emergency.

We cannot recommend Senate No. 1504*

A. Problems of Elderly and Disabled Persons

This bill would strike out Chapter 201 of the General Laws and substitute a new chapter on "Guardians", which term would cover guardians for the mentally ill, minors, mentally retarded persons and spendthrifts. Conservators of those of advanced age or weakness are also covered.

It appears that the proponents do not object to the present Chapter 201, but a desire to allow isolated elderly and disabled persons, and some retarded persons, to have a limited form of guardianship which would permit such persons to retain their independence as far as possible.

It is asserted that the most immediate need of such persons is to have a "guardian" available to preserve their assets and to make legal decisions and give legal consents for medical treatment.

Obviously, a conservator or guardian appointed by the court may now preserve the assets, make legal decisions and give necessary consents.

It is suggested that in the case of low and moderate income elderly and disabled persons, citizens are hesitating to act as guardians or conservators because "their responsibility is extensive and their liability unclear."

*Similar legislation has been filed for the 1979 session of the General Court as Senate No. 840.

The guardian would be compensated reasonably. It is apparent at the outset that elderly isolated persons who have few friends or relatives, would probably be compensated from public funds in most cases.

In contrast, the liability of the guardian is such that there would be no individual liability. The guardian would be liable in tort only if "at fault."

We believe there are also many citizens who would be better protected under the existing Chapter 201, principally because the legal responsibility of guardians and conservators is so abundantly clear from the decisions of the courts and the mandate of the statutes. Many persons under guardianship or conservatorship have substantial estates that need stringent protection from those incapable of resisting impulses to assert dominion over property belonging to someone in an incapacitated status. The bill is drafted without regard to the proven proclivities of mankind for overreaching.

We concur to the desire to give all possible assistance to elderly and disabled persons of low income and existing in "isolation," but the wholesale rejection of Chapter 201 is not a step in the right direction and we oppose it.

B. Special "Guardians"

The proponents of this bill plead an excellent case of a "Special" kind of guardian for the neglected elderly or other disabled or weak person.

- a. The need for a special guardian would first be demonstrated by a licensed social worker or other *competent* "resource person" who would make a written report after investigation.
- b. The court would provide an independent legal counsel for the affected person.
- c. A judicial hearing would be held after which the court would make written findings as to the incapacity, the scope of the restriction on the ward, and the services or "program" to which the ward should be directed.
- d. The court would reserve for itself decisions to commit the ward to a nursing home, mental health facility, or other facility or authorizing sterilization or abortion.

The proposal is that a "non-profit corporation" could be appointed guardian if it or its agent has "life experience or qualifications" indicating it will perform well.

There would be periodic reports, accounts and reviews of the guardian's stewardship.

Senate No. 1635 does not successfully establish a workable procedure for this kind of special guardian and should not, in its present form, be enacted even as a "Special" additional part of Chapter 201 with a limited purpose.

If a precedent is sought for this kind of special guardianship, one might review the comprehensive North Carolina Statute. Section 35-1.6 to 35-1.39 was added in 1977 to cover "Guardianship of Incompetent Adults" or special or limited guardians. The North Carolina legislature did not eliminate the traditional guardianship but added a special procedure for mentally retarded, epileptic, cerebral palsied or autistic persons, and certain others.

The California legislature has provided a special guardianship procedure in many ways similar to that suggested by Senate No. 1504, but this is a very limited situation for a limited time.

Some aspects of special guardianship are found in the Nevada statute, but there, as in most jurisdictions, the statute provides for the immediate appointment of temporary guardians or conservators as the need arises.

C. Costs of Program

The proposal of Senate No. 1504 would require a "tailor-made" guardianship for each person. The judge would, *in every case*, be required to conduct an extensive hearing and make an extensive report in each petition. The court would be required to make decisions as to nursing homes and engage in the very important work of the social service agencies.

At present there are no personnel or funds with which such a program could be carried out. The court would necessarily depend greatly on its staff for much of the background review and preparation of the case. There would be need for ongoing supervision.

All these very necessary additional duties would divert the judge from his judicial function and saddle the existing staff with more work than it could reasonably perform. We note that much of this supervisory work might require investigatory and social service activities outside the courthouse.

If each affected person was given legal counsel, this cost would have to be borne by the public.

It was the consensus of the Judicial Conference of Probate Judges

on May 2, 1978 that this bill does have a care objective - to aid the isolated and low income elderly - which is desirable.

Neither the Judicial Council nor the Office of the Chief Justice of the Probate Courts was able to make a reliable appraisal of the costs involved in this program. The estimations furnished by certain proponents lacked supporting data.

D. Recommendation

If a proposal such as this is carefully re-drafted as an alternative procedure to existing guardianship and conservatorship statutes, and if by Federal Funding under Title XX of the Social Security Act and Title III of the Older Americans Act, and other Federal Sources, there is permanent financing available, it is conceivable that some form of limited or special guardianship could be established. The provisions of Senate No. 1504 should be the model for such a proposal.

IV. CONSUMER PROTECTION

A. Exhaustion of Administrative Remedies

B. Unfair or Deceptive Insurance Practices

C. Enforcement by District Attorneys

D. Additional Definition in Class Actions

E. Findings of the Federal Trade Commission

F. Action by Attorney General in Federal Trade Commission Cases

G. Costs and Attorney's Fees for the Commonwealth

H. Contempts

I. "Willful and Continuous" Violations

J. Action Without Proof of Loss of Money or Property

K. Expansion of Special Statutory Class Actions Under Chapter 93A

L. Class Actions Procedures or Deceptive "Methods"

M. Attorney's Fees in Class Actions where no Money or Property Damages are Involved

A. Exhaustion of Administrative Remedies

HOUSE (1978) No. 4985

AN ACT REPEALING THE LAW RELATIVE TO ELIMINATING THE PROCEDURE FOR REMOVING CERTAIN CONSUMER PROTECTIONS CASES TO REGULATORY AGENCIES.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 Section 9 of chapter 93A of the General Laws, as most recently
- 2 amended by chapter 939 of the acts of 1973, is hereby further
- 3 amended by striking out paragraph (7).

We do not recommend House No. 4985.

Paragraph (7) of Section 9 of Chapter 93A as amended by Chapter 939 of the Acts of 1973 now reads as follows:

(7) The court may upon motion by the respondent before the time for answering and after a hearing suspend proceedings brought under this sec-

tion to permit the respondent to initiate action in which the petitioner shall be named a party before any appropriate regulatory board or officer providing adjudicatory hearings to complainants if the respondent's evidence indicates that:

(a) there is a substantial likelihood that final action by the court favorable to the petitioner would require of the respondent conduct or practices that would disrupt or be inconsistent with a regulatory scheme that regulates or covers the actions or transactions complained of by the petitioner established and administered under law by any state or federal regulatory board or officer acting under statutory authority of the commonwealth or of the United States; or

(b) that said regulatory board or officer has a substantial interest in reviewing said transactions or actions prior to judicial action under this chapter and that the said regulatory board or officer has the power to provide substantially the relief sought by the petitioner and the class, if any, which the petitioner represents, under this section.

Upon suspending proceedings under this section, the court may enter any interlocutory or temporary orders it deems necessary and proper pending final action by the regulatory board or officer and trial, if any, in the court, including issuance of injunctions, certification of a class, and orders concerning the presentation of the matter to the regulatory board or officer. The court shall issue appropriate interlocutory orders, decrees and injunctions to preserve the status quo between the parties pending final action by the regulatory board or officer and trial and shall stay all proceedings in any court or before any regulatory board or officer in which petitioner and respondent are necessarily involved. The court may issue further orders, injunctions or other relief while the matter is before the regulatory board or officer and shall terminate the suspension and bring the matter forward for trial if it finds (a) that proceedings before the regulatory board or officer are unreasonably delayed or otherwise unreasonably prejudicial to the interests of a party before the court, or (b) that the regulatory board or officer has not taken final action within six months of the beginning of the order suspending proceedings under this chapter.

In the case of *Gordon v. Hardware Mutual Casualty Co.*, 361 Mass. 582 (1972), Gordon, the plaintiff, had purchased automobile insurance regularly from Hardware. When his coverage was renewed, he was not given notice of an increase in cost. Gordon said this was an unfair act or practice under Chapter 93A.

Gordon gave the required notice under Chapter 93A, Section 9(3). No offer of settlement was made and Gordon brought suit to recover damages (the excess cost of insurance). The insurance company claimed that Gordon had not "exhausted his administrative remedies."

As the court pointed out, there is and was a complicated rate regulation procedure which Gordon might have followed to get back his increased premium. The cost in time and effort in even pursuing such a complicated procedure, and the fact that success was by no means guaranteed, apparently led Gordon to sue under Chapter 93A instead.

The court decided that Gordon should have exhausted his administrative remedy before he resorted to the courts. The court said:

. . . the (insurance) commissioner is given substantial power to regulate the business of insurance. Exercise of his regulatory power may afford the plaintiff (Gordon) some measure of relief (if he is entitled to any relief) and, in any event, may affect the scope and character of any judicial relief which may be given. Exhaustion of the possibilities of action by the commissioner should precede independent action in the courts to prevent the alleged unfair act or practice.”

New Discretionary Procedure

It is quite apparent that the General Court did not accept the reasoning of the court in the *Gordon* case.

The provisions of Chapter 93A which was enacted in 1973 (Section 9(7)) overrode the decision of the Supreme Judicial Court and provided a new discretionary procedure in place of the time honored “exhaustion of administrative remedy” rule.

Under existing law, the court may determine that administrative action is first necessary or the court may decide that nothing useful would be accomplished by such reference, or even that the administrative action is mired in red tape or inaction.

We see no reason to repeal Section 9(7) of Chapter 93A. It is a reasonable approach in consumer cases, and it should remain.

B. Unfair or Deceptive Insurance Practices

HOUSE (1978) No. 5184

AN ACT ENLARGING CIVIL REMEDIES FOR CONSUMER PROTECTION.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Paragraph 1 of section 9 of chapter 93A, as most recently
2 amended by chapter 241 of the acts of 1971, is hereby further
3 amended by inserting after the word, "two", in line 7, the words:—
4 or any person violating clause nine of section three of chapter one
5 hundred and seventy-six D.

We recommend House No. 5184.

General Laws Chapter 176D was revised and amended in 1972. In Section 3 of this Chapter there is a specific definition of what constitutes "Unfair Methods of Competition and Unfair or Deceptive Acts and Practices" in the business of insurance.

Many of the prohibited practices defined in Chapter 176D are very obviously within the scope of General Laws Chapter 93A, Section 2 which declares unlawful unfair methods of competition and unfair or deceptive acts or practices in the conduct of *any* trade or commerce.

In 1977, the Supreme Judicial Court decided the case of *Dodd v. Commercial Union Ins. Co.*, 1977 A.S. 1540, and held that the provisions of General Laws Chapter 176D, which empower the Commissioner of Insurance to act in matters relative to the insurance industry, do not preempt regulation of insurance matters in the consumer protection field under the authority of General Laws Chapter 93A.

The Court said in the *Dodd* case that appropriate public officials could act either under Chapter 176D or Chapter 93A to eliminate the alleged practice (*See*: General Laws Chapter 176D, Section 3(9)) of failing to pay personal injury claims within 30 days.

Consumer Actions

Private individuals can now bring actions under Chapter 93A against insurers who allegedly are engaged in prohibited practices.

The proposed amendment would clarify for all concerned that an action under Chapter 93A to enforce the rights of an individual to obtain relief against an insurer for one or more of the prohibited practices listed in Chapter 176D, Section 3 would be specifically authorized by the General Court.

There will now be a clear mandate to include all such prohibited practices under Chapter 93A while also allowing the insurance commissioner to deal with them as Chapter 176D provides.

C. Enforcement by District Attorneys

SENATE (1978) No. 104

AN ACT FURTHER REGULATING BUSINESS PRACTICES FOR CONSUMER PROTECTION.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 4 of chapter 93A as most recently
2 amended by chapter 544 of the acts of 1972 is hereby amended
3 by adding after the words "unlawful" in the first sentence the
4 words "and when ever a district attorney has reason to believe
5 that such person is using or is about to use any such method,
6 act or practice within his district,"

1 SECTION 2. The second paragraph of said section 4 of said
2 chapter 93A is hereby amended by adding after the words
3 "attorney general" in the first sentence the words "or the dis-
4 trict attorney."

1 SECTION 3. The third paragraph of said section 4 of said
2 chapter 93A is hereby amended by striking in the first line the
3 words "district attorney or" and by striking the period at the
4 end of the paragraph and inserting in place thereof "or the
5 district attorney".

1 SECTION 4. The fifth paragraph of said section 4 of said
2 chapter 93A is hereby amended by adding after the words
3 "attorney general" the words "or the district attorney".

1 SECTION 5. The first sentence of section 5 of said chapter
2 93A is hereby amended by adding after the words "the at-
3 torney general" the words "or the district attorney".

1 SECTION 6. The seventh sentence of section 5 of said chap-
2 ter 93A is hereby amended by adding after the words "at-
3 torney general" the words "or the district attorney".

1. SECTION 7. The last sentence of section 5 of said chapter
2 93A is hereby amended by striking the period and adding the
3 words "or any district attorney".

1 SECTION 8. Section 6(1) of said chapter 93A is hereby
2 amended by adding after the word “chapter” in the first sen-
3 tence the following: — “and a district attorney, whenever he
4 believes a person has engaged in or is engaging in any such
5 method, act, or practice within his district.”

1 SECTION 9. Section 6(1) of said chapter 93A is hereby
2 amended by striking the last sentence and inserting in place
3 thereof the following:—

4 “such testimony and examination if conducted by the at-
5 torney general shall take place in the county where such person
6 resides or has a place of business or, if the person is a non-
7 resident or has no place of business within the commonwealth,
8 in Suffolk County.

9 If such testimony is taken or examination is conducted by a
10 district attorney it may take place in any of the places enu-
11 merated in the preceding sentence, or in the county within the
12 district attorney’s district in which it appears, as set out in the
13 notice described in paragraph (2) and (4) of this section, that
14 the cause for such testimony or examination has arisen.”

1 SECTION 10. Section 6(2) of said chapter 93A is hereby
2 amended by adding after the words “attorney general” the
3 words “or the district attorney.”

1 SECTION 11. Section 6(4) of said chapter 93A is hereby
2 amended by adding after the words “attorney general’s staff”
3 the words “or the district attorney’s staff”.

1 SECTION 12. Section 6(6) of said chapter 93A is hereby
2 amended by adding after the words “the attorney general” the
3 words “or the district attorney”.

1 SECTION 13. The second paragraph of section 7 of said
2 chapter 93A is hereby amended by striking the first sentence
3 and inserting in place thereof the following:—

4 “the attorney general or the district attorney may file in
5 the superior court of the county in which such person resides
6 or has his principal place of business, or of Suffolk County if
7 such person is a non resident or has no principal place of
8 business in the commonwealth or of the county where such
9 testimony or examination is to take place as set out in the
10 notice described in paragraph (2) and (4) of section 6 of this
11 chapter or any county adjoining thereto, and served upon such

12 person, in the same manner as provided in section 6, a petition
13 for an order of such course for the enforcement of this section
14 and of section 6.

1 SECTION 14. Section 10 of said chapter 93A is hereby amend-
2 ed by striking the first paragraph and inserting in place there-
3 of the following:—

4 “upon commencement of any action brought under section
5 9, the clerk of the court shall mail a copy of the bill in equity
6 to the attorney general and to the district attorney in whose
7 district the action is brought, and, upon entry of any judgment
8 or decree to the attorney or general the said district attorney
9 shall have standing to intervene as a party in such action.”

We oppose Senate No. 104.

Under General Laws Chapter 93A, the Department of the Attorney General is granted the power to:

- (a) make rules and regulations relative to unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce; and
- (b) bring a court action, (or otherwise act) to stop any unfair methods or practices in trade or commerce which are unlawful.

The Attorney General must determine that court action will be in the public interest. Statements made by the Department of the Attorney General have indicated that many situations are being resolved without action in court.

The role of the Attorney General is one of policy making and action which is designed to protect the public as a whole. While a deceptive practice may be manifested in a single case or complaint, and the resolution of one complaint may have far reaching benefits to the public at large, the Attorney General cannot handle the volume of individual cases which have arisen.

There is no doubt that attorneys for legal assistance projects and agencies, and attorneys in private practice are making wider and wider use of the new legal rights conferred by Chapter 93A. There does not appear to be any lack of knowledge of consumer rights on the part of the public and the office of the Attorney General is most active and skillful in advancing the consumer protection cause.

We do not believe that there is a current need to assign consumer protection litigation and investigations to the district attorney.

In the first place, the various district attorneys and their full-time

assistants are only beginning to cope with the enormous caseload imposed upon them. With the new consolidation of courts still in the testing phase, we are very reluctant to add new burdens to the prosecutors.

Secondly, we envision the role of the Attorney General to be one in which there is selective investigation and prosecution of those whose consumer law offenses are of such potential magnitude as to affect the entire Commonwealth.

The prosecutorial resources and budgets cannot be stretched too thin. If the Attorney General curbs an abuse in Salem, it is unlikely that the same business entity will attempt the same abuse in Springfield. If such a thing should happen, it is better that the management of consumer protection cases of concern to the entire state be left to the Department of the Attorney General.

It would not be wise to allow differing or inconsistent consumer policies to develop through the various offices of the district attorneys.

D. Additional Definitions in Class Actions

SENATE (1978) No. 121

AN ACT FURTHER REGULATING BUSINESS PRACTICES FOR CONSUMER PROTECTION.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1. SECTION 1. Section 1 of chapter 93A of the General Laws
- 2 is hereby amended by adding after paragraph (d), added by
- 3 section 1 of chapter 814 of the acts of 1969, the following para-
- 4 graph: —
- 5 (e) “Notice” with reference to informing members of a
- 6 class of any matter in connection with a class action shall
- 7 mean taking such steps as may be reasonably required to in-
- 8 form members in ordinary course whether or not all members
- 9 actually come to know of it. Reasonable steps may, as the
- 10 circumstances of a particular case warrant, include one or
- 11 more of the following: —

12 (1) publication, when individual notice is not possible be-
13 cause individual class members cannot be identified through
14 reasonable effort;

15 (2) mailing to individual members of a class;

16 (3) service under the Massachusetts Rules of Civil Pro-
17 cedure for commencing civil actions upon identifiable members
18 of a class numbering no more than twenty.

1 SECTION 2. Section 2 of said chapter 93A, added by section
2 1 of chapter 813 of the acts of 1967, is hereby amended by
3 adding after paragraph (c) the following paragraph: —

4 (d) Successful completion by the Federal Trade Commis-
5 sion of any action, the basis of which arose in the Common-
6 wealth, brought by it pursuant to the Federal Trade Commis-
7 sion Act (15 U.S.C. 45(a) (1), as from time to time amended,
8 shall constitute prima facie evidence of a violation of sub-
9 section 2 (a) of this chapter. For the purposes of this para-
10 graph “successful completion” shall be a finding of a viola-
11 tion of the Federal Trade Commission Act (15 U.S.C. 45(a)
12 (1)) or any regulation issued pursuant thereto, after all avail-
13 able appeals have been waived or exhausted.

1 SECTION 3. Paragraph 1 (c) of section 3 of said chapter
2 93A, as most recently amended by section 2 of chapter 814 of
3 the acts of 1969, is hereby amended by striking out said para-
4 graph and inserting in place thereof the following para-
5 graph: —

6 (c) transactions or actions of any person who shows that he
7 has had served upon him by the Federal Trade Commission
8 a complaint pursuant to a 16 U.S.C. 45(b) relating to said
9 transactions or actions until the Federal Trade Commission
10 has either: —

11 (1) dismissed said complaint,

12 (2) secured an assurance of voluntary compliance,

13 (3) issued a cease and desist order relating to said com-
14 plaint pursuant to 15 U.S.C. 45(b).

15 (4) failed to assert in writing to the Attorney General, with-
16 in fourteen days of notice to it and to said person by the At-
17 torney General, its objection to action proposed by him and
18 set forth in said notice or,

19 (5) asserted in writing to the Attorney General its objection

20 to the proposed action, and ninety days have elapsed since the
21 date of said written objection.

1 SECTION 4. The first paragraph of section 4 of said chapter
2 93A, as most recently amended by chapter 544 of the Acts of
3 1972, is hereby further amended by adding the following sen-
4 tence: — In any action or proceeding brought under the pro-
5 visions of this chapter in which an act or practice in violation
6 of this chapter has been found, the Attorney General shall be
7 entitled to recover costs on behalf of the Commonwealth, and
8 reasonable attorney's fees, but such fees shall be recoverable
9 only if the use or employment of the art or practice was a will-
10 ful or knowing violation of section two or that the refusal to
11 grant relief upon demand sent pursuant to this section was
12 made with knowledge or reason to know what the act or prac-
13 tice complained of violated said section two.

1 SECTION 5. The fourth paragraph of section 4 of said chap-
2 ter 93A, as most recently amended by section 3 of chapter 814
3 of the acts of 1969, is hereby further amended by striking out
4 said paragraph and inserting in place thereof the following
5 paragraph: —

6 Any person who violates the terms of an injunction or other
7 order issued under this section shall, in a subsequent proceed-
8 ing for contempt, forfeit and pay to the Commonwealth a civil
9 penalty of not more than ten thousand dollars for each viola-
10 tion in addition to, and without thereby limiting, any other
11 remedy available in such proceeding. For the purpose of this
12 section, the court issuing such an injunction or order shall re-
13 tain jurisdiction, and the cause shall be continued, and in such
14 case the Attorney General, acting in the name of the Common-
15 wealth, or any other person entitled to relief under the decree,
16 may petition said court for recovery of such civil penalty.

1 SECTION 6. Section 8 of said chapter 93A, as most recently
2 amended by section 4 of chapter 814 of the acts of 1969, is
3 hereby further amended by striking out said section and in-
4 serting in place thereof the following: —

5 *Section 8.* Upon petition by the Attorney General, the court
6 may for willful and continuous violation of any injunction, or-
7 der or judgment issued pursuant to section four, order the

8 dissolution, or suspension or forfeiture of franchise of any
9 corporation or the right of any foreign corporation to do busi-
10 ness in the Commonwealth.

1 SECTION 7. Paragraphs (1) through (4) of section 9 of said
2 chapter 93A, as most recently amended by chapter 241 of the
3 acts of 1971, are hereby further amended by striking out said
4 paragraphs and inserting in place thereof the following para-
5 graphs: —

6 (1) Any person, other than a person entitled to bring an
7 action under section eleven of this chapter, who has been in-
8 jured by another person's use or employment of any method,
9 act or practice declared to be unlawful by section two or any
10 rule or regulation issued thereunder may (a) bring a civil ac-
11 tion or counterclaim, where appropriate, in the Superior Court
12 for his damages and for equitable relief, including an injunc-
13 tion, as the court deems to be necessary and appropriate, or
14 (b) if a defendant in a District Court, raise a defense or in-
15 terpose a counterclaim for his damages, as provided in this
16 chapter.

17 (2) (a) Any person entitled to bring an action under para-
18 graph (1) of this section may bring an action as a class action
19 on behalf of himself and all persons injured in the Common-
20 wealth for damages and such other relief as he and such other
21 persons are entitled to under this section.

22 (b) The court at any stage of an action brought under this
23 paragraph may hold a hearing to determine whether the action
24 may be maintained as a class action. The court shall consider
25 only the following factors in determining whether an action
26 may be maintained as a class action:

27 (i) the class is so numerous that joinder of all members is
28 impracticable,

29 (ii) there are questions of law or fact common to the class,

30 (iii) the claims or counterclaims of the representative
31 parties are typical of the claims or counterclaims of the class,
32 and

33 (iv) the representative parties will fairly and adequately
34 protect the interests of the class.

35 (c) The court shall make written findings with respect to its
36 determination. An order based upon such findings may be

37 condition and may be altered or amended following appropriate
38 notice and opportunity to be heard prior to any decision on
39 the merits.

40 (d) A class action shall not be dismissed, settled or com-
41 promised without the approval of the court. The court may
42 require notice of such proposed dismissal, settlement or com-
43 promise to be given in such manner as the court directs.

44 (e) If the action is permitted to be maintained as a class ac-
45 tion under this paragraph, the court shall require that reason-
46 able notice of the action be given to all ascertainable members
47 of the class which shall, in terms understandable by an ordi-
48 nary person:

49 (i) briefly state the nature, alleged grounds, and status of
50 the action, and

51 (ii) inform the recipient that: —

52 (A) the court will exclude him from the class if he so re-
53 quests by a specified date;

54 (B) the judgment, whether favorable or not, will include all
55 members who do not request exclusion, and

56 (C) any member who requests inclusion may, if he desires,
57 enter an appearance through counsel.

58 No member of the class to whom notice is not given shall be
59 bound by the judgment or any other action of the court unless
60 such person later affirmatively elects to be so bound, but, as to
61 all parties to whom notice is given and who do not request
62 exclusion, the judgment or other action of the court shall be
63 binding on them.

64 (f) The court may make such orders as are necessary to the
65 efficient and expeditious disposition of any class action main-
66 tained under this paragraph including orders: —

67 (i) limiting the action to particular classes, persons on issues
68 except that the class shall not, except as required in unusual
69 circumstances, be limited to persons appearing as parties there-
70 in;

71 (ii) dividing the proposed class into subclasses and treating
72 each subclass as a separate class to the extent that such sep-
73 arate treatment is necessary or appropriate with respect to
74 the trial of questions of law or fact;

75 (iii) determining the course and conduct of the proceedings
76 including orders to prevent undue repetition or complication
77 in the presentation of evidence or argument; and

78 (iv) establishing procedures for the submission and deter-
79 mination of any issues relevant to only individual members of
80 a class or subclass.

81 (g) The judgment in any class action, whether or not favor-
82 able to the class, shall describe those persons found by the
83 court to be members of the class and who have not been ex-
84 cluded from the class. Notice of the judgment, its effect and
85 any action that must be taken to benefit from a judgment
86 favorable to the class shall be given in such manner as the
87 court directs.

88 (h) The responsibility for giving notice and the costs of
89 any notice required to be given to the class shall be assessed
90 to the plaintiff by the court in such manner as it deems fair
91 and just; however, all costs of notice of a compromise, settle-
92 ment or judgment favorable to the class shall be assessed to
93 the defendant as a cost recoverable under paragraph (4) of
94 this section.

95 (3) At least thirty days prior to the filing of any such ac-
96 tion, a written demand for relief, identifying the claimant and
97 class, if any, on whose behalf the action will be brought, and
98 reasonably describing the unfair or deceptive method, act or
99 practice relied upon and the injury suffered, shall be mailed
100 or delivered to any prospective defendant. Any person receiv-
101 ing such a demand for relief who, within thirty days of the
102 mailing or delivery of the demand for relief, makes a written
103 tender of settlement which is rejected by the claimant may, in
104 any subsequent action, file the written tender and an affidavit
105 concerning its rejection and thereby limit any recovery to the
106 relief tendered, if the court finds that the relief tendered was
107 reasonable in relation to the injury complained of by the plain-
108 tiff. In all other cases, if the court finds for the plaintiff or
109 plaintiffs, recovery shall be in the amount of actual damages
110 or twenty-five dollars per plaintiff, whichever is greater, for
111 each plaintiff for whom actual damages have been proven in
112 court, or up to three but not less than two times such amount
113 if the court finds that the use or employment of the method,
114 act or practice was a willful or knowing violation of said sec-
115 tion two or any rule or regulation issued thereunder or that
116 the refusal to grant relief upon demand was made in bad faith
117 with knowledge or reason to know that the method, act or
118 practice complained of violated said section two or any rule

119 or regulation issued thereunder. No damages shall be awarded
120 to any member of the plaintiff class whose actual damages
121 have not been proven in court. In addition, the court shall
122 award such other equitable relief, including an injunction, as
123 it deems to be necessary and proper. The demand require-
124 ments of this paragraph shall not apply if the prospective de-
125 fendant does not maintain a place of business or does not
126 keep assets within the Commonwealth, or when the person
127 filing such an action seeks preliminary or temporary injunc-
128 tive relief or if the person filing such a claim does so as a
129 counterclaim, but such defendant or a defendant in counter-
130 claim may otherwise employ the provisions of this paragraph
131 by making a written offer of relief and paying the rejected
132 tender into court as soon as practicable after receiving notice
133 of an action or counterclaim commenced under this section.

134 (4) The court shall, in addition to other relief provided for
135 by this section, award to plaintiff or plaintiff in counterclaim
136 in an action in which it is found that there has been a viola-
137 tion of section two or a rule or regulation issued thereunder,
138 reimbursement for costs, litigation expenses and a reasonable
139 attorney's fee for services furnished in connection with the ac-
140 tion; provided that in an action brought under this section, the
141 court may refuse to award reimbursement for costs, litigation
142 expenses or attorney's fees incurred subsequent to the rejec-
143 tion by plaintiff of a written offer of settlement found by the
144 court under paragraph (3) of this section to have been reason-
145 able in relation to the injury or damage sustained or sought
146 to be remedied.

1 SECTION 8. Said chapter 93A is hereby amended by adding
2 the following new section: —

3 *Section 12.* Any remedy available under this chapter shall
4 be in addition to any other remedy provided by law.

D. House Version of Senate No. 121

HOUSE (1978) No. 972

AN ACT FURTHER REGULATING BUSINESS PRACTICES FOR CONSUMER PROTECTION.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 1 of chapter 93A of the General Laws is
2 hereby amended by adding after paragraph (d), added by section 1
3 of chapter 814 of the acts of 1969, the following paragraph: —

4 (e) “Notice” with reference to informing members of a class of
5 any matter in connection with a class action shall mean taking such
6 steps as may be reasonably required to inform members in
7 ordinary course whether or not all members actually come to know
8 of it. Reasonable steps may, as the circumstances of a particular
9 case warrant, include one or more of the following: —

10 (1) publication, when individual notice is not possible because
11 individual class members cannot be identified through reasonable
12 effort;

13 (2) mailing to individual members of a class;

14 (3) service under the Massachusetts Rules of Civil Procedure
15 for commencing civil actions upon identifiable members of a class
16 numbering no more than twenty.

1 SECTION 2. Section 2 of said chapter 93A, added by section 1
2 of chapter 813 of the acts of 1967, is hereby amended by adding
3 after paragraph (c) the following paragraph: —

4 (d) Successful completion by the Federal Trade Commission of
5 any action, the basis of which arose in the Commonwealth,
6 brought by it pursuant to the Federal Trade Commission Act (15
7 U.S.C.45(a)(1)), as from time to time amended, shall constitute
8 prima facie evidence of a violation of subsection 2 (a) of this
9 chapter. For the purposes of this paragraph “successful comple-
10 tion” shall be a finding of a violation of the Federal Trade

11 Commission Act (15 U.S.C.45(a)(1)) or any regulation issued
12 pursuant thereto, after all available appeals have been waived or
13 exhausted.

1 SECTION 3. Paragraph 1(c) of section 3 of said chapter 93A,
2 as most recently amended by section 2 of chapter 814 of the acts of
3 1969, is hereby amended by striking out said paragraph and
4 inserting in place thereof the following paragraph: —

5 (c) transactions or actions of any person who shows that he has
6 had served upon him by the Federal Trade Commission a
7 complaint pursuant to a 15 U.S.C. 45(b) relating to said
8 transactions or actions until the Federal Trade Commission has
9 either: —

10 (1) dismissed said complaint,

11 (2) secured an assurance of voluntary compliance,

12 (3) issued a cease and desist order relating to said complaint
13 pursuant to 15 U.S.C. 45(b),

14 (4) failed to assert in writing to the Attorney General, within
15 fourteen days of notice to it and to said person by the Attorney
16 General, its objection to action proposed by him and set forth in
17 said notice or,

18 (5) asserted in writing to the Attorney General its objection to
19 the proposed action, and ninety days have elapsed since the date of
20 said written objection.

1 SECTION 4. The first paragraph of section 4 of said chapter
2 93A, as most recently amended by chapter 544 of the Acts of 1972,
3 is hereby further amended by adding the following sentence: — In
4 any action or proceeding brought under the provisions of this
5 chapter in which an act or practice in violation of this chapter has
6 been found, the Attorney General shall be entitled to recover costs
7 on behalf of the Commonwealth, and reasonable attorney's fees,
8 but such fees shall be recoverable only if the use or employment of
9 the act or practice was a willful or knowing violation of section two
10 or that the refusal to grant relief upon demand sent pursuant to this
11 section was made with knowledge or reason to know that the act
12 or practice complained of violated said section two.

1 SECTION 5. The fourth paragraph of section 4 of said chapter
2 93A, as most recently amended by section 3 of chapter 814 of the
3 acts of 1969, is hereby further amended by striking out said

4 paragraph and inserting in place thereof the following
5 paragraph: —

6 Any person who violates the terms of an injunction or other
7 order issued under this section shall, in a subsequent proceeding
8 for contempt, forfeit and pay to the Commonwealth a civil penalty
9 of not more than ten thousand dollars for each violation in
10 addition to, and without thereby limiting, any other remedy
11 available in such proceeding. For the purpose of this section, the
12 court issuing such an injunction or order shall retain jurisdiction,
13 and the cause shall be continued, and in such case the Attorney
14 General, acting in the name of the Commonwealth, or any other
15 person entitled to relief under the decree, may petition said court
16 for recovery of such civil penalty.

1 SECTION 6. Section 8 of said chapter 93A, as most recently
2 amended by section 4 of chapter 814 of the acts of 1969, is hereby
3 further amended by striking out said section and inserting in place
4 thereof the following: —

5 *Section 8.* Upon petition by the Attorney General, the court
6 may for willful and continuous violation of any injunction, order
7 or judgment issued pursuant to section four, order the dissolution,
8 or suspension or forfeiture of franchise of any corporation or the
9 right of any foreign corporation to do business in the Com-
10 monwealth.

1 SECTION 7. Paragraphs (1) through (4) of section 9 of said
2 chapter 93A, as most recently amended by chapter 241 of the acts
3 of 1971, are hereby further amended by striking out said
4 paragraphs and inserting in place thereof the following
5 paragraphs: —

6 (1) Any person, other than a person entitled to bring an action
7 under section eleven of this chapter, who has been injured by
8 another person's use or employment of any method, act or practice
9 declared to be unlawful by section two or any rule or regulation
10 issued thereunder may (a) bring a civil action or counterclaim,
11 where appropriate, in the Superior Court for his damages and for
12 equitable relief, including an injunction, as the court deems to be
13 necessary and appropriate, or (b) if a defendant in a District Court,
14 raise a defense or interpose a counterclaim for his damages, as
15 provided in this chapter.

16 (2)(a) Any person entitled to bring an action under paragraph

17 (1) of this section may bring an action as a class action on behalf of
18 himself and all persons injured in the Commonwealth for damages
19 and such other relief as he and such other persons are entitled to
20 under this section.

21 (b) The court at any state of an action brought under this
22 paragraph may hold a hearing to determine whether the action
23 may be maintained as a class action. The court shall consider only
24 the following factors in determining whether an action may be
25 maintained as class action:

26 (i) the class is so numerous that joinder of all members is
27 impracticable.

28 (ii) there are questions of law or fact common to the class,

29 (iii) the claims or counterclaims of the representative parties are
30 typical of the claims or counterclaims of the class, and

31 (iv) the representative parties will fairly and adequately protect
32 the interests of the class.

33 (c) The court shall make written findings with respect to its
34 determination. An order based upon such findings may be
35 condition and may be altered or amended following appropriate
36 notice and opportunity to be heard prior to any decision on the
37 merits.

38 (d) A class action shall not be dismissed, settled or com-
39 promised without the approval of the court. The court may require
40 notice of such proposed dismissal, settlement or compromise to be
41 given in such manner as the court directs.

42 (c) If the action is permitted to be maintained a class action
43 under this paragraph, the court shall require that reasonable notice
44 of the action be given to all ascertainable members of the class
45 which notice shall, in terms understandable by an ordinary person:

46 (i) briefly state the nature, alleged grounds, and status of the
47 action, and

48 (ii) inform the recipient that: —

49 (A) the court will exclude him from the class if he so requests by
50 a specified date;

51 (B) the judgment, whether favorable or not, will include all
52 members who do not request exclusion, and

53 (C) any member who requests inclusion may, if he desires, enter
54 an appearance through counsel.

55 No member of the class to whom notice is not given shall be
56 bound by the judgment or any other action of the court unless such
57 person later affirmatively elects to do so bound, but, as to all

58 parties to whom notice is given and who do not request exclusion,
59 the judgment or other action of the court shall be binding on them.

60 (f) The court may make such orders as are necessary to the
61 efficient and expeditious disposition of any class action main-
62 tained under this paragraph including orders: —

63 (i) limiting the action to particular classes, persons or issues
64 except that the class shall not, except as required in unusual
65 circumstances, be limited to persons appearing as parties therein;

66 (ii) dividing the proposed class into subclasses and treating each
67 subclass as a separate class to the extent that such separate
68 treatment is necessary or appropriate with respect to the trial of
69 questions of law or fact;

70 (iii) determining the course and conduct of the proceedings
71 including orders to prevent undue repetition or complication in the
72 presentation of evidence or argument; and

73 (iv) establishing procedures for the submission and determina-
74 tion of any issues relevant to only individual members of a class or
75 subclass.

76 (g) The judgment in any class action, whether or not favorable
77 to the class, shall describe those persons found by the court to be
78 members of the class and who have not been excluded from the
79 class. Notice of the judgment, its effect and any action that must be
80 taken to benefit from a judgment favorable to the class shall be
81 given in such manner as the court directs.

82 (h) The responsibility for giving notice and the costs of any
83 notice required to be given to the class shall be assessed to the
84 plaintiff by the court in such manner as it deems fair and just;
85 however, all costs of notice of a compromise, settlement or
86 judgment favorable to the class shall be assessed to the defendant
87 as a cost recoverable under paragraph (4) of this section.

88 (3) At least thirty days prior to the filing of any such action, a
89 written demand for relief, identifying the claimant and class, if any,
90 on whose behalf the action will be brought, and reasonably
91 describing the unfair or deceptive method, act or practice relied
92 upon and the injury suffered, shall be mailed or delivered to any
93 prospective defendant. Any person receiving such a demand for
94 relief who, within thirty days of the mailing or delivery of the
95 demand for relief, makes a written tender of settlement which is
96 rejected by the claimant may, in any subsequent action, file the
97 written tender and an affidavit concerning its rejection and thereby
98 limit any recovery to the relief tendered, if the court finds that the

99 relief tendered was reasonable in relation to the injury complained
100 of by the plaintiff. In all other cases, if the court finds for the
101 plaintiff or plaintiffs, recovery shall be in the amount of actual
102 damages or twenty-five dollars per plaintiff, whichever is greater,
103 for each plaintiff for whom actual damages have been proven in
104 court, or up to three but not less than two times such amount if the
105 court finds that the use or employment of the method, act or
106 practice was a willful or knowing violation of said section two or
107 any rule or regulation issued thereunder or that the refusal to grant
108 relief upon demand was made in bad faith with knowledge or
109 reason to know that the method, act or practice complained of
110 violated said section two or any rule or regulation issued
111 thereunder. No damages shall be awarded to any member of the
112 plaintiff class whose actual damages have not been proven in court.
113 In addition, the court shall award such other equitable relief,
114 including an injunction, as it deems to be necessary and proper.
115 The demand requirements of this paragraph shall not apply if the
116 prospective defendant does not maintain a place of business or
117 does not keep assets within the Commonwealth, or when the
118 person filing such an action seeks preliminary or temporary
119 injunctive relief or if the person filing such a claim does so as a
120 counterclaim, but such defendant or a defendant in counterclaim
121 may otherwise employ the provisions of this paragraph by making
122 a written offer of relief and paying the rejected tender into court as
123 soon as practicable after receiving notice of an action or
124 counterclaim commenced under this section.

125 (4) The court shall, in addition to other relief provided for by
126 this section, award to plaintiff or plaintiff in counterclaim in an
127 action in which it is found that there has been a violation of section
128 two or a rule or regulation issued thereunder, reimbursement for
129 costs, litigation expenses and a reasonable attorney's fee for
130 services furnished in connection with the action; provided that in
131 an action brought under this section, the court may refuse to award
132 reimbursement for costs, litigation expenses or attorney's fees
133 incurred subsequent to the rejection by plaintiff of a written offer
134 of settlement found by the court under paragraph (3) of this section
135 to have been reasonable in relation to the injury or damage
136 sustained or sought to be remedied.

1 SECTION 8. Said chapter 93A is hereby amended by adding
2 the following new section: —

3 *Section 12.* Any remedy available under this chapter shall be in
4 addition to any other remedy provided by law.

We support such amendments to Chapter 93A as may cause consistency in the judicial procedures which are involved.

SECTION 1 of Senate No. 121 of 1978 merely adds a further definition of the word "Notice" to the existing definitions of "Person"; "Trade"; "Documentary Material"; etc.

This new definition would be used only if a class action were to be commenced under Chapter 93A, Section 9(2) or under Section 11.

Rule 23 Conflict

In class actions under Massachusetts Rule 23(d) the decision of the judge is required in connection with notice matters. This rule should continue to be applicable to consumer actions under Chapter 93A, as we have noted further in this Report.

It is not inappropriate to define "Notice" as has been done in SECTION 1 of Senate 121 of 1978, but we would not recommend the enactment of SECTION 1, lines 1 to 18 inclusive unless the following subsection (4) was first added.

- (4) Notwithstanding this definition of "Notice" the court shall order any other, different, or additional notice to be given, so as to fairly and adequately protect the interests of all actual or potential parties, and in a manner consistent with Rule 23(d) of the Massachusetts Rules of Civil Procedure.

As so amended, we recommend SECTION 1 of Senate No. 121 of 1978.

E. Findings of the Federal Trade Commission

We recommend SECTION 2 of this bill.

Under SECTION 2 of Senate No. 121 of 1978, there would be added to the list of "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or business"

a finding of a violation of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) or any regulation issued pursuant thereto after all available appeals have been waived or exhausted.

The concept here is to make a Federal Trade Commission violation

prima facie evidence of a violation of Chapter 93A if the matter arose in the Commonwealth.

At present, the Massachusetts courts cannot go this far. The courts of Massachusetts under Chapter 93A, Section 2(6) are not to be guided by the interpretations of the Federal Trade Commission.

F. Action by Attorney General in Federal Trade Commission Cases

We recommend SECTION 3 of this bill, with an amendment.

At present, Chapter 93A, Section 3(1)(c) provides that Chapter 93A does not apply to certain transactions which are already the subject of a complaint by the Federal Trade Commission under 15 U.S.C. (45)(b)* during the pendency of the Federal Trade Commission case on the federal level.

The amendment would permit the Attorney General to proceed also, despite the pendency of the Federal Trade Commission case, if:

- (a) the Federal Trade Commission does not object in writing, within 14 days after receipt of notice to it from the Attorney General the proposed state action; or
- (b) if the Federal Trade Commission does object, but 90 days have elapsed since the Federal Trade Commission objection was registered.

The purpose of this amendment is to cause the Federal Trade Commission to expedite any action it might be taking. For example, the Federal Trade Commission could issue a cease and desist order and allow the Attorney General to proceed at the state level.

The Attorney General's department indicates that 90 days is ample for the Federal Trade Commission to act, and that if the Federal Trade Commission is not going to act, there is no reason for the case to be stalled by inertia.

We recommend this SECTION 3 except that we believe that line 16 should read "thirty days" so as to give the Federal Trade Commission about two more weeks to take action than the bill provides.

G. Costs and Attorneys Fees for the Commonwealth

Under Chapter 93A, Section 4, the Attorney General, if it is in the public interest, may sue in behalf of the Commonwealth to stop alleged unfair methods of competition or deceptive acts or practices.

*Senate No. 121 of 1978, line 8 of Section 3 says 16 U.S.C.; it should be 15 U.S.C.

There is no present statutory authority in Chapter 93A to award costs to the Commonwealth and the proposed amendment must be interpreted in such a manner as to allow costs if only the Commonwealth should prevail in the action.

We interpose no objection to a provision which would permit the court to make an award of costs to the Commonwealth in a consumer action under Chapter 93A.

Attorneys' Fees

We are opposed to much of the proposed SECTION 4 of Senate No. 121 of 1978 which would allow the Commonwealth to recover "reasonable attorneys' fees."

The draftsmen of this bill apparently shared some of our concern as is evidenced by lines 8 to 13 of SECTION 4. There it is provided that attorneys' fees would not be recoverable unless there was a "*willful or knowing*" violation or refusal to grant relief.

We think this qualification on the award of attorneys' fees demonstrates the possible penal quality of this proposal. We recommend that the proposed amendment be limited to costs only.

If all the language of SECTION 4, lines 8 through 13 is eliminated we would recommend the enactment of this provision for costs.

H. Contempts

Chapter 93A, Section 4 now provides that if a person violates an injunction or other order of the court, a civil penalty may be assessed in an amount not more than \$10,000.

The proposed amendment by SECTION 5 of Senate No. 121 of 1978 makes it clear that such a penalty may be recovered in a "*subsequent proceeding for contempt*."

We are advised that this is a technical amendment which is desirable in the opinion of the Department of the Attorney General.

We recommend SECTION 5 of Senate No. 121 of 1978.

I. "Willful and Continuous" Violations

SECTION 6 of Senate No. 121 of 1978 proposes to substitute the words "*willful and continuous*" violation for the present words of the statute "*habitual*" violation.

The Judicial Council takes no position on this change in terminology.

J. Action Without Proof of Loss of Money or Property

Under Chapter 93A, Section 9(1) as presently enacted:

“Any person who purchases or leases goods, services or property, real or personal” —

- (i) primarily for *personal, family or household* purposes, and
- (ii) thereby suffers any *loss of money* or property, real or personal
- (iii) as the result of an unfair or deceptive act or practice declared unlawful under section two or by any rule or regulation issued under paragraph (c) of section two

may bring a Chapter 93A action.*

Under SECTION 7, Paragraph 1 of Senate No. 121 of 1978 some very significant changes would result.

1. The Chapter 93A action could be brought by any person other than one engaged in trade or commerce.
2. No purchase or lease of goods or services would be necessary, nor would a purchase of real or personal property be necessary.
3. Consumer goods or services would not necessarily be involved. The requirement as to *personal, family or household purposes* would be dropped.
4. No *loss of money* need be involved. A person could commence an action although there was no money lost by such person.

The plaintiff would be required to prove that he or she had been *injured* by another person's use or employment of an unlawful act, practice, or *method*. There is no definition of the term “method”.

Under the present law, the Supreme Judicial Court has held that “severe emotional distress” caused to a debtor by reason of 180 telephone calls; use of false identities by the bill collector; threats of legal action; embarrassing and abusive language; threats to publish the debtor's credit record; contacts with third persons about the debt; ringing the door bell 100 times on one occasion; and 24 personal visits in three months to collect \$213.30 was not a loss of “property” or a money loss under Chapter 93A. This recital does not

*We note that Chapter 93A actions for money damages including counterclaims, cross claims, or third party actions, can now be brought in the district court department. Acts of 1978, Chapter 478, Section 46.

cover all of the bizzare conduct of agents of the loan company in this case of *Baldassari v. Public Finance Trust*, 1975 A.S. 3188.

We can find nothing admirable in such collection practices and note that there was a violation of at least five provisions of General Laws Chapter 93, Section 49 (Unfair, Deceptive or Unreasonable Collection Procedures).

The court said that the plaintiff might have had a claim for false imprisonment and for "intentional infliction of emotional distress." The case of *George v. Jordan Marsh Co.*, 359 Mass. 244 (1971) was cited as authority to bring a timely tort action for emotional distress.

In the *Baldassari* case, it appears that the tort claims noted were barred by the passage of time. Under General Laws Chapter 260, Section 2A these claims should apparently have been put into suit before the two year limitation.

The *Baldassari* case presents a situation which could have been sustained in court under Chapter 93A if the proposed amendment to SECTION 7, Paragraph 1 had been in effect.

It also should be made clear that if the plaintiff, Baldassari, had commenced his tort action earlier, he might have been awarded damages under traditional tort principles.

It was observed in the *Baldassari* case that:

According to the principal draftsman of G.L. c. 93A, Sec. 9, the 'sole purpose' of the requirement that the plaintiff *suffer loss of money or property* 'is to guard against vicarious suits by self-constituted private attorneys general when they spot an apparently deceiving advertisement in the newspaper, on television, or in a store window.'

One could postulate a number of situations in which a citizen could bring a Chapter 93A suit under the proposed amendment. Suppose a taxpayer discovered that a state agency purchased an expensive item or service which was later made to appear to involve unfair or deceptive practices. Such citizen, either alone or in a class action, might claim injury as a taxpayer, or because the item was wasteful, extravagant or the services of small benefit and great cost.

While such an action may seem far fetched, it would clearly fall within the provision suggested by SECTION 7, Paragraph 1 of Senate No. 121 of 1978.

We do not recommend this proposal.

The removal of the requirement that a person must suffer money damage or damage to his property will result in a plethora of private

lawsuits. The Attorney General can protect the public at large under appropriate regulations made by his department. Individuals should be required to show loss of money or property.

K. Expansion of Special Statutory Class Actions Under Chapter 93A

We do not recommend Senate No. 121, SECTION 7, paragraph 2 in this form.

It may be appropriate to take note of the comment of the Supreme Judicial Court in the case of *Heller v. Silverbranch Construction Corporation et als*, 1978 A.S. 2850, at 2856.

Both this court and the (U.S.) Supreme Court have consistently held that consumer protection statutes created new substantive rights by making conduct unlawful which was not previously unlawful under the common law or any prior statute. The statutory language (Chapter 93A) is not dependent on traditional tort or contract law concepts for its definition.

It does not necessarily follow, however, that because the General Court, like Congress, has provided new remedies to consumers, there should also be special procedures, in the form of statutes, which may create considerable confusion and may pave the way for potential abuse of the class action procedure. Problems already exist in this area.

1. Present State of Massachusetts Class Actions

Under the Massachusetts Rules of Civil Procedure, all class actions are presumably governed by the following rule:

Rule 23

CLASS ACTIONS

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. The court may require notice of such proposed dismissal or compromise to be given in such manner as the court directs.

(d) Orders to Insure Adequate Representation. The court at any stage of an action under this rule may require such security and impose such terms as shall fairly and adequately protect the interests of the class in whose behalf the action is brought or defended. It may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment, or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire. Whenever the representation appears to the court inadequate fairly to protect the interests of absent parties who may be bound by the judgment, the court may at any time prior to judgment order an amendment of the pleadings, eliminating therefrom all reference to representation of absent persons, and the court shall order entry of judgment in such form as to affect only the parties to the action and those adequately represented.

Prior to the adoption of this rule in 1974, class actions in Massachusetts were subject to procedures which had been developed on a case by case basis over the years.

Although the Massachusetts courts had limited experience with many new procedures under the Rules of Civil Procedure, there is a great reservoir of experience under Federal Rule 23. Federal Rule 23 provisions are not identical with the Massachusetts rule.

Our Supreme Judicial Court has pointed out in the case of *Baldassari v. Public Finance Trust*, 1975 A.S. 3188, that there are various differences between Massachusetts Rule 23 and Federal Rule 23; and that because of the language of General Laws Chapter 93A, Section 9(2) there are further procedural technicalities applicable only to consumer protection cases under Chapter 93A, some provi-

sions of which were enacted between 1971 and 1973, and prior to the adoption of the Massachusetts Rules of Civil Procedure.

2. Special Consumer Procedures

The *Baldassari* court was of the opinion that the conflicts between Massachusetts Rule 23 and the class action procedure under General Laws Chapter 93A, Section 9(2) should be resolved in favor of the statutory procedure which was less restrictive on the consumer, or consumer activist.

The *Baldassari* court declared that it would not there pursue the class action issues of consumer cases under Chapter 93A in further detail. The court said that the consumer protection act was:

designed to meet a pressing need for an effective private remedy, and again declare that traditional technicalities are not to be read into the statute in such a way as to impede the accomplishment of substantial justice.

The present language of General Laws Chapter 93A, Section 9(2) reads as follows:

(2) Any persons entitled to bring such action may, if the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons; the court shall require that notice of such action be given to unnamed petitioners in the most effective practicable manner. Such action shall not be dismissed, settled or compromised without the approval of the court, and notice of any proposed dismissal, settlement or compromise shall be given to all members of the class of petitioners in such manner as the court directs.

Both Federal and Massachusetts Rules 23 require that the common or class aspects of a class action “*predominate*” over any questions of law or fact which affect only one or more individual members of the class.

It has been declared by the Supreme Judicial Court of Massachusetts that a motion to certify a class action as appropriate, although not required by Rule 23, is often necessary.

These court rules also require that the class action be *superior* to

other available methods for the fair and efficient adjudication of the controversy.

The *Baldassari* court said:

The predominance and superiority requirements introduce a highly discretionary element . . . The statute (Ch. 93A) has a more mandatory tone. We do not believe that the subsequent adoption of Rule 23 was intended to curtail any remedial rights granted by the statute.

3. The Proposed Amendment to Section 9(2)

To expand the philosophy of the *Baldassari* court, and to make Chapter 93A actions almost independent of Massachusetts Rule 23, the proposed amendment makes significant changes:

1. No loss of money would apparently be necessary by anyone.
2. Numerous persons “similarly situated” would not be a factor nor would it be necessary to show specific injury to numerous persons. The case would merely be put forth as “typical”.
3. The court would be restricted to considering *only* four factors in determining whether the class action could be maintained:
 - (i) the class is so numerous that joinder of all members is impracticable;
 - (ii) there are questions of law or fact common to the class;
 - (iii) the claims or counterclaims of the representative parties are typical of the claims or counterclaims of the class; and
 - (iv) the representative parties will fairly and adequately protect the interests of the class.

While these four factors are the same factors set forth in Massachusetts Rule 23(a) as “Prerequisites to Class Action”, the elimination of the requirement now found in Chapter 93A, Section 9(2) that there be numerous persons “similarly injured and similarly situated” who must suffer a money loss, and the rigid demand that the court consider no other factors causes an imbalance of legal rights.

We note that “any person” may bring a class action. A person may commence an action for a variety of reasons and seek to use the judicial system as a sword as well as a shield. The court is not to be enlisted as the advocate of one of the parties.

Notably lacking from the proposed amendment to Section 9(c) is the provision of Rule 23(d) which reads:

(d) Orders to Insure Adequate Representation. The court at any stage of an action under this rule may require such security and im-

pose such terms as shall fairly and adequately protect the interests of the class in whose behalf the action is brought or defended. It may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment, or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire. Whenever the representation appears to the court inadequate fairly to protect the interests of absent parties who may be bound by the judgment, the court may at any time prior to judgment order an amendment of the pleadings, eliminating therefrom all reference to representation of absent persons, and the court shall order entry of judgment in such form as to affect only the parties to the action and those adequately represented.

The omission of this provision, and its possible exclusion from consumer class actions by future judicial interpretation is very undesirable.

There are possible abuses in the class action such as:

1. solicitation of legal representation of class members;
2. solicitation of funds and agreements to pay fees and expenses from class members;
3. solicitation by parties of requests by some class members to opt out in the class action;
4. unauthorized direct or indirect communications from counsel or a party, which may misrepresent the status, purposes, and effects of the action and of court orders therein, and which may confuse actual and potential class members and which may reflect adversely on the court or the administration of justice; and
5. difficulties in management of a class action by the court.

The court has a very active and important role in class actions and it should not be circumscribed by statutory fetters which might stay the hand of justice.

In *Held v. Missouri P. R. Co.*, 64 F.R.D. 346 (1974) the court saw a fundamental duty to insure that there was no fraud or collusion in arriving at a fair compromise in a class action suit, and also to insure that the compromise was such that the class action procedure was not a device used abusively by the plaintiff as legalized blackmail.

If the Supreme Judicial Court should further pursue the class action issues of the consumer protection case under Chapter 93A, it seems that consistency alone would lead the court to the conclusion

that in enacting the proposed amendment to Section 9(c), the General Court intended to give every person the ability to pursue class actions without reference to Rule 23, purportedly to protect the consumer, but nevertheless, under conditions which we think are undesirable.

We must not forget the fact that under General Laws Chapter 93A, Section 4, the Attorney General has a very potent weapon against consumer fraud or unfair and deceptive practices.

We are not opposed to class actions by consumers in behalf of themselves and other consumers who have suffered financial loss.

Such actions can now be carried on under Rule 23 and under the existing provisions of General Laws Chapter 93A, Section 9(2).

We oppose the suggested amendment as one which is inconsistent with the orderly development of practice under Rule 23. It would be more appropriate to eliminate the inconsistencies between present Massachusetts Rule 23 and General Laws Chapter 93A, Section 9(2) in favor of Rule 23.

The court rule permits more flexibility as problems arise in the future and a revision of that rule by the court in light of its experience.

We think that it is significant that class actions under Federal Rule 23 have been certified in cases involving racial and ethnic discrimination, social security benefits, job rights, prisoner's practice, housing, food stamps, stocks and bonds, podiatrist's practice, sex discrimination, school segregation, welfare benefits, nursing homes, mental patient's rights, land use, credit card practices (interest), securities losses, divorce cases, high school newspapers, urban renewal, the F.B.I., minority rights of every description, real estate brokers, pension benefits, anti-trust, insurance policies, collective bargaining, public housing rent payments, fraud, sale of pneumatic tools at allegedly excessive prices, etc.

These cases have been handled by the courts without the necessity of specific statutes prescribing separate class action procedures.

L. Class Actions Procedures or Deceptive "Methods"

SECTION 7, Paragraph 3 of Senate No. 121 of 1978 makes certain changes in Chapter 93A, Section 9(3) which deals with the procedure in class actions.

1. The class action would be available if an unfair or deceptive "*method*" was used. There is no definition of the term "*method*". Presumably, the *Baldassari* case prompted the sug-

gestion that the word "method" be introduced into Chapter 93A.

2. While the statute now speaks of a tender of relief to the plaintiff being *reasonable in relation to the injury actually suffered by the plaintiff*, the proposed amendment speaks of such tender being reasonable in relation to the *injury complained of by the plaintiff*. The difference is considerable.
3. The statute now provides that if there is a finding for the plaintiff, the actual damages shall be awarded or \$25.00, whichever is greater.

It seems to be the intent of the amendment to give every member of the class at least \$25.00 "*for whom actual damages have been proven in court.*"

It would appear that the real intent of this amendment is to give every member of a class at least \$25.00 (\$50.00 if there is willful intent) if there is proof of a deceptive or unfair act, practice or *method* as to *any* member of that class. Actual damages are to be awarded if proved, of course.

It is idle to suggest that in a class action under Chapter 93A, there would be separate proof of actual damages as to each plaintiff (member of the class).

It is the obvious aim of Senate No. 121 of 1978 as a whole to permit a class action in which a "typical" case will be presented with the result that all those similarly situated will be given relief.

Apparently the assembling of a class and a reasonable proof of small damages to a few could result in a \$25.00 benefit (less counsel fees and expenses) for hundreds or even thousands of persons similarly situated, even though they had suffered no money or property loss and might be wholly unconcerned except to collect anything that was offered.

The language in lines 111 and 119 to 121 does not say what is meant and does not mean what is said.

M. Attorneys' Fees in Class Actions where no Money or Property Damages are Involved

Chapter 93A, Section 9(4) now provides for reasonable attorneys' fees and costs to be paid in connection with a class action if money or property damages have been suffered, "irrespective of the amount in controversy."

Both this Paragraph 4 and Paragraph 3 of the proposed SECTION 7 introduce the concept that a class action may be maintained for a violation of any regulation made by the Attorney General under Chapter 93A, Section 2(c). This language merely adds confusion to the statute.

This Paragraph 4 also provides for the payment of attorneys' fees and costs if a deceptive practice has taken place *even though no money or property damages have taken place*.

The proposed Paragraph 4 also requires the court to find that the written offer of settlement in a class action must be *reasonable in relation to the injury or damage sustained or sought to be remedied*, or costs and fees will be payable.

Again the philosophy of the amendment is inconsistent. Since it would no longer be necessary under Chapter 93A to show money or property damage, the "injury or damage" would be a matter of speculation and conjecture in those cases where no dollar amount could be ascertained.

The proposed amendment would permit and would encourage class actions on flimsy grounds (as well as those on solid grounds) with almost a guarantee of counsel fees and costs if a deceptive act, practice or method could be shown at the outset and regardless of the actual harm that resulted.

V. SENTENCING

A. Initial Special Committee Proposal

B. Minimum Sentence

C. LEAA Study

D. Superior Court Study

Many within the judicial system, and many outside the judicial system have been concerned with the sentencing process.

In a recent report by the "Special Joint Committee on Uniform Sentencing and Revision of the Criminal Law Statutes" established under House Order No. 6595 of 1977, it is asserted that

the current sentencing policies and practices are highly variable, extremely confusing and frequently inequitable.

The Committee expresses concern regarding the various criminal justice agencies (the courts, correction departments, probation and parole boards) in that these agencies are "completely ineffective in dealing with the problem of using crime."

The Committee also refers to a "pernicious belief" that the imposition of a sentence is "more reflective of the socio-economic status of the offender than it is of the crime committed."

The report further asserts that "the sentencing policy of the Commonwealth should be designed around the following goals:

PUNISHMENT
PROTECTION
DETERRENCE
REHABILITATION"

and that these goals should be weighed in each case. Admittedly, there is little that is novel in this statement of goals. This statement of goals, although desirable, does not greatly contribute to further progress in the field of rehabilitation, nor does it foreshadow any promising solution to the sentencing problem.

The Special Committee reviewed the various categories of sentence:

Type

1. Indeterminate
2. Minimum Mandatory
3. Flat-Time (Fixed)
4. Presumptive

In its first report, the Committee favors "Presumptive Sentencing." This concept has been under very serious study at the national level since at least the time of the presentation of the American Law Institute Model Penal Code Draft No. 2 of 1954.

The adoption of "Presumptive Sentencing" would clearly erode the present authority of the individual judge to exercise a sound discretion at the time of sentencing.

The Committee further states:

It is the opinion of this Committee that the presumptive approach to sentencing provides the most effective balance between our goal of achieving more consistent and certain sentencing while *retaining a necessary measure of judicial discretion*.

The principle of *judicial discretion* in sentencing is the core of the present system. Under various criminal statutes the judge is given a wide variety of alternatives in the average case.

1. In a few instances, there is a mandatory sentence requiring confinement or a fine. There is no opportunity for judicial discretion.
2. In most instances, however, there is a statutory minimum and maximum sentence *e.g.*, not less than one or more than five years of confinement.

Even though there is a minimum and maximum sentence in such cases, the court need not impose such sentence but may:

- a. order probation;
- b. continue the case without a finding and later dismiss it; or
- c. impose a sentence, and suspend its execution.

The court is *not* required to order a *minimum* term of confinement.

A. Initial Special Committee Proposal

To achieve a goal of "Presumptive Sentencing" the Committee will propose a new Chapter 264A to "provide sanctions" (sentences) for seven categories of offenses reflected in the classification of many statutory crimes.

Felonies would be divided into four classes and there would be two classes of misdemeanors.

In the Model Penal Code there are three classes of felony for which the range of sentences is as follows:

<i>Felonies</i>	<i>“Mandatory”¹ Minimum</i>	<i>Discretionary Minimum</i>	<i>Maximum</i>
A. First Degree	One Year	Ten Years	Life
Extended Term	Five Years	Ten Years	Life
B. Second Degree	One Year	Three Years	Ten Years
Extended Term	One Year	Five Years	Ten to Twenty Years
C. Third Degree	One Year	Two Years	Five Years
Extended Term	One Year	Three Years	Five to Ten Years
<i>Misdemeanors</i>	<i>“Mandatory”¹ Minimum</i>	<i>Discretionary Minimum</i>	<i>Maximum</i>
A. Misdemeanor Fine	None	None	One Year \$1,000
B. Petty Mis- demeanor Fine	None	None	Thirty Days \$500

There is also a schedule of fines as follows:

	<i>Maximum Fine</i>
First Degree Felony	\$10,000
Second Degree Felony	\$10,000
Third Degree Felony	\$ 5,000

If a statute authorizes a higher fine, the higher maximum can be imposed. The offender can also be fined “double the pecuniary gain derived.”

The philosophy of the Model Penal Code is that

no person convicted of an offense shall be sentenced otherwise than in accordance with . . . the Code.

Despite the range of sentences for the various degree of felonies and misdemeanors, a judge, acting under statutes consistent with the Model Penal Code, would still retain the following discretion:

1. to suspend a sentence (except in murder cases) or to order civil commitment for rehabilitation — *e.g.*, narcotics, alcohol;
2. to order a fine in lieu of imprisonment;
3. to order probation or a short 30 day sentence followed by probation;

¹ Such term is only “mandatory” if confinement is ordered.

- 4. to order confinement for the term specified for the degree of offense;
- 5. to order probation and a fine;
- 6. to order confinement and a fine;
- 7. to order other civil penalties and loss of license, privilege, office or status.

The *Model Sentencing Act* was published in 1963 and provides certain guidelines.

	Ordinary Offender		Dangerous Offender	
	Minimum	Maximum	Minimum	Maximum
First Degree Murder	none	life	none	life
Atrocious Crimes (arson, rape, bombing)	none	0-10 yrs.	none	0-30 yrs.
Ordinary Felonies (larceny, burglary, etc.)	none	0-5 yrs.	none	0-30 yrs.

The Model Sentencing Act does not prescribe a minimum sentence but allows the court discretion in ordinary felonies to:

- (a) suspend sentence with or without probation;
- (b) order probation;
- (c) impose a fine; and
- (d) commit defendant for up to five years in a state facility or up to one year in a local correctional institution.

In making a comparison of the penalties suggested, we see this in the case of the “ordinary” or “second degree” felony committed by a non-dangerous person:

Model Penal Code		Model Sentencing Act	
Minimum	Maximum	Minimum	Maximum
Not less than one nor more than three years.	Not more than ten years.	None	Not more than five years.

Those who press for the classification of felonies, as is done in the Model Penal Code, can be expected to be consistent with the entire philosophy of that purposed code and to advocate *minimum* terms in felony cases.

The policy question as to minimum terms has been debated for several years at the national level.

The statutory plan for sentencing in Massachusetts is found in G.L. Chapter 279.

Some of the features of the present plan are as follows:

1. There are various specific penalties calling for more or less inconsistent terms of incarceration, or fines, for offenses which are similar in degree or kind.
2. The maximum term of incarceration, where a lesser time is not specified, in a jail or house of correction, the reformatory for women, or MCI, Concord is two and one-half years.
3. The minimum term of incarceration in the state prison (and no such state prison incarceration is mandatory) is for two and one-half years.

B. Minimum Sentence

The penalty for unlawfully carrying dangerous weapons is an example of the mandatory minimum sentence. The statute provides that any person convicted under G.L. Chapter 269, Section 10:

. . . shall be punished by imprisonment in the state prison for not less than two and one-half nor more than five years, or for not less than one year nor more than two and one-half years in a jail or house of correction. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection (a) be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served one year of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subsection or a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric services unavailable at said institution. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file.

The provisions of section eighty-seven of chapter two hundred and seventy-six, shall not apply to any person seventeen years of age or over, charged with a violation of this subsection, or to any child between age fourteen and seventeen, so charged, if the court is of the opinion that the interests of the public require that he should be tried for such offense instead of being dealt with as a child.

4. Sentences, except for offenses punishable by death or life imprisonment, can be suspended. (Section 1)
5. Probation can be ordered if a sentence is suspended. (Section 1A)
6. Conditional Sentences — “Thirty Dollars or Thirty Days” are allowed under Section 10.
7. Special weekend and holiday sentences are provided for first offenders in less serious offenses. (Section 6A)

It is, of course, true that in Massachusetts there is some disparity in sentencing.

In G.L. Chapter 278, Section 28B, there is provision for the appellate review of state prison sentences by the Appellate Division of the Superior Court.

Sections 29A, 29B and 29C of G.L. Chapter 278 permit the revision of sentences on the basis that justice was not done or cannot be done, but this procedure requires action within sixty days after the original sentence has been imposed.

Such statutes as these last mentioned are designed to prevent harsh or excessive sentences, yet under this statute the sentence may be increased.

There is no statute, except G.L. Chapter 269, Section 10, which provides that a convicted person must serve a minimum term.

It is argued that some persons who are convicted of a specific offense may be sentenced to jail (although in practice a first offender is rarely thus sentenced) while others would be given a suspended sentence with or without probation.

It is also argued that two offenders might be given differing terms — one long, the other short — for the same offense.

Above everything else, it appears to be suggested that while there may be reasons for tailoring the punishment to fit the criminal under normal circumstances, there must be a statutory minimum term of incarceration for a number of crimes. In past years, the types of offense for which mandatory minimum sentences have been sought by petitions to the General Court include:

1. auto theft (second offense);
2. violent crimes against the elderly;
3. sale or distribution of “hard drugs”;
4. sex crimes involving children;
5. fire arms violations;
6. murder, rape and kidnapping.

There are probably others.

The Judicial Council has always opposed *mandatory* incarceration, and cannot see any reason why this traditional position should now be changed.

C. LEAA Study

At this point, the National Institute of Law Enforcement and Criminal Justice has announced an LEAA "competitive research grant" of \$400,000 for a program of up to 30 months in duration to "evaluate the multijurisdictional sentencing guidelines" in a given state. The announced objectives of this project include the evaluation of sentencing guidelines, practices, and see if they are generally feasible.

D. Superior Court Study

It is obvious that a series of guidelines is "feasible" and that a project such as that being carried on presently by the justices of the Massachusetts Superior Court can be effective in establishing sentencing goals which will be more uniform in the "typical" case. Clearly, it is difficult to fit cases into a pre-established mold.

Justice in this Commonwealth will not be significantly improved by the legislative adoption of mandatory minimum sentences for the "ordinary" felony.

Some persons who commit a felony pose no threat to society; panic or despair may have led to the crime. Incarceration may so twist the individual, especially the younger person, that rehabilitation is made extremely difficult or perhaps even impossible.

The General Court should vest discretion over sentencing in the Judiciary, and we encourage the development of sentencing guidelines which do not involve mandatory incarceration, except for atrocious crimes and first degree murder.

It is not to be overlooked that when a judge in Massachusetts is convinced that a state prison term is necessary, the sentence must be for a minimum of 2½ years under G.L. Chapter 279, Section 24.

It is also highly questionable to compel the sentencing of additional persons who might well be suitable for probation, rather than incarceration, to Massachusetts correctional institutions which lack the capacity to handle even those who are committed there under existing law.

We urge the General Court to refrain from enacting any legislation on sentencing at this time. The studies should continue and there should be enlightened debate and discussion as to what will be useful and productive prior to any legislative action.

JUDICIAL COUNCIL OF MASSACHUSETTS

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FIFTY-FIFTH REPORT 1979

JUDICIAL IMPACT STATEMENTS

**BLOOD GROUPING TESTS TO
DETERMINE PATERNITY**

**REVERSIONARY INTERESTS CLAIMED
BY GOVERNMENTAL ENTITIES**

PARCEL INDEXING

ENFORCEMENT OF SUPPORT OBLIGATIONS

(Complete Table of Contents on Pages 1-3)



FIFTY-FIFTH REPORT

Judicial Council of Massachusetts

—1979—

CONTENTS OF THIS REPORT

TABLE OF LEGISLATION REFERRED TO THE JUDICIAL COUNCIL IN 1979	5
MEMBERSHIP OF THE JUDICIAL COUNCIL	6
THE ACT CREATING THE JUDICIAL COUNCIL	7
MEMORIAL — JUDGE FRANK J. DONAHUE	8
INDEX OF SOME 1980 HOUSE AND SENATE BILLS ON SUBJECTS DISCUSSED IN THIS REPORT ..	99
I. THE ADMINISTRATION OF JUSTICE	9
A. The First Year of Consolidation — 1979	10
B. A Modest Proposal for Judicial Impact Statements	12
C. Juror Utilization and Jury Reform	18
D. Sentencing	19
E. The Probate and Family Court	20
F. The Unified Budget	21
II. COMPETENCY TO STAND TRIAL	27
III. BLOOD GROUPING TESTS (HLA) TO DETERMINE PATERNITY	31

IV. LAND RECORDS	41
A. Project on Public Records Concerning Land	47
1. RESPA Section 13-History	47
2. Expense and Risk in Purchase of Real Estate	49
3. Scope of Proposal	50
4. Parcel Indexing for Governmental and Administrative Purposes	51
5. Parcel Indexing to Replace Grantor/Grantee Index System	54
6. Effect of Parcel Identifiers	57
B. Procedural Changes in Recording of Land	
Court Title Records	59
1. Draft Act on Information Storage Facilities	59
2. Draft Act on Assessors Maps for Land Court	60
C. Changes in Conveyancing Practices for	
Registered Land	61
1. Land Court Examiners	62
2. Notice of Petition	63
3. Regulations for Plans	63
4. Publication of Notice-Registration of Land	63
5. Draft Act on Land Court Procedures	63
D. Opposition to Current Proposals	65
1. Registration of Land Without Establishment of Boundaries	65
2. Pre-Registration of Title	66
E. Conveyancing Legislation Recommended	67
1. Draft Act on Registration of Title to Condominiums	67
2. Draft Act on Amendments to Master Deeds - Percentages	70
3. Draft Act on Withdrawal of Public Land from Registration	72
F. Land Records Advisory Committee	72
G. Technical Improvements in Land Court	
Administration	73

1. Draft Act on Transfer of Cases Between Trial
Court Departments 73
2. Draft Act on Conformity of Land Court Rules
to Massachusetts Rules of Civil Procedure 74

**V. RIGHTS OF RE-ENTRY AND POSSIBILITIES OF
REVERTER HELD BY THE COMMONWEALTH
AND THE UNITED STATES OF AMERICA 87**

- A. Titles of the Commonwealth 89
- B. Titles of the United States 92
 1. Proprietary Titles 92
 2. Federal Land Purchased With Consent of a State ... 93
- C. Draft Act Recommended 95

**VI. ATTACHMENT OF WAGES -
CHILD SUPPORT 97**



The Commonwealth of Massachusetts

February, 1980

THE HONORABLE EDWARD J. KING
Governor of Massachusetts

Dear Governor King:

In accordance with the provisions of Chapter 221, Section 34A of the General Laws, we have the honor to transmit the fifty-fifth report of the Judicial Council for the year 1979.

JACOB J. SPIEGEL, CHAIRMAN
PAUL T. SMITH, VICE CHAIRMAN
SALLY CORWIN
E. GEORGE DAHER
HARRY J. ELAM
CLIFFORD E. ELIAS
LAWRENCE F. FELONEY
DONALD R. GRANT
THOMAS R. MORSE, JR.
ALFRED L. PODOLSKI
WILLIAM I. RANDALL
JAMES G. REARDON

1979 HOUSE BILLS REFERRED TO THE JUDICIAL COUNCIL

1979 BILL NUMBER	1979 RESOLVE CHAPTER	SUBJECT MATTER	PAGE IN THIS REPORT
H. 5501	1	An Act requiring that a certain blood test be administered in paternity suits	31
H. 5328	2	An Act relative to determining competency of a defendant to stand trial	27
H. 1805	4	An Act to protect owners who acquire land after reasonable search of deed records from forfeiting it because of rights of entry or possibilities of reverter of which they have no knowledge, by requiring recording of statements by claimants of entry or reverter rights when assessors have failed to name correct owners, or whose prior statements may be beyond reasonable search period, or who are the Commonwealth or the United States	87
H. 2955	5	An Act providing for the garnishment of certain wages and benefits for the purpose of fulfilling child support obligations	97
H. 3510	6	An Act providing for the improvement of public records concerning land in the Commonwealth	41

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(JANUARY 1980)**

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JAMES G. REARDON *of West Boylston*

JAMES B. MULDOON *of Weston*, SECRETARY
Two Center Plaza, Boston, Mass. 02108

INQUIRIES CONCERNING THE JUDICIAL COUNCIL

Copies of this report are sent to all members of the legislature, judges, clerks of court, libraries, city and town clerks, and many others.

Persons interested in matters under consideration by the Judicial Council and in the improvement of the judicial system of the Commonwealth are invited to communicate with the Secretary of the Judicial Council, James B. Muldoon, 2 Center Plaza, Boston, Massachusetts 02108.

JUDICIAL COUNCIL**G.L. Chapter 221, §§34A-34C**

The Judicial Council was established to make a continuous independent study of the organization, procedure, and practice of the courts.

The Council makes recommendations requested by the legislature and suggests improvements in the administration of justice.

Statutory Authority

Section 34A. There shall be a judicial council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the appeals court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the chief judge of the probate courts in the commonwealth or some other judge or former judge of those courts appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the district courts in the commonwealth or some other justice or former justice of those courts appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods, not exceeding four years, as he shall determine.

Section 34B. The judicial council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

Section 34C. No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof, shall receive from the commonwealth a salary of ten thousand dollars.

JUDGE FRANK J. DONAHUE
1881-1979

Judge Frank J. Donahue, Chairman of the Judicial Council between 1938 and 1958, died in 1979 after a lifetime dedicated to his family, public service, the law, the Superior Court, the Division of Industrial Accidents, the Judicial Council, Suffolk University Law School, and many other noble endeavours.

It was Judge Donahue's philosophy to build on a sound foundation, patiently, and with imagination, but above all, in a way which clearly demonstrated the purpose of his efforts whether in a decision, in a recommendation for judicial administration, or in the careful advancement of his pride, Suffolk University Law School.

In his dispositions in criminal cases, especially those involving crimes of violence, he was often called severe. He believed that violence could only be lessened by severe measures equal to the nature of the offense.

He was a just man.

Judge Donahue was appointed to represent the Superior Court on the Judicial Council in 1938. He became Chairman of the Judicial Council in that year and served until his "retirement" in 1958. Although Judge Donahue relinquished his chairmanship, he continued to make many recommendations to the Council and its members. Under his leadership the Judicial Council made numerous pleas for improvement of the administration of justice, some of which were finally heeded by the enactment of the omnibus court reorganization statute, Chapter 478 of 1978.

After stepping down from the Judicial Council, Judge Donahue continued as an active Associate Justice of the Superior Court until the Constitutional Amendment of 1973 obliged him to retire from active duty at the age of 92. His services as an Associate Justice of the Superior Court covered a span of 41 years, and his public service spanned a period of over 60 years.

I. THE ADMINISTRATION OF JUSTICE

- A. The First Year of Consolidation — 1979**
- B. A Modest Proposal for Judicial Impact Statements**
- C. Juror Utilization and Jury Reform**
- D. Sentencing**
- E. The Probate and Family Court**
- F. The Unified Budget**

A. THE FIRST YEAR OF CONSOLIDATION — 1979

With the enactment of the “Courts — Consolidation” Act, Chapter 478 of the Acts of 1978, Massachusetts commenced the legislatively mandated program of court reform. The ultimate objectives of this act are:

1. unification or consolidation of the Trial Courts with recognition that the need for the specialized courts, such as the Land Court, Probate and Family Court, and Housing Court still exists;
2. centralized management of personnel and facilities;
3. centralized rule making;
4. centralized budgeting and state financing.

1979 was the first full year of operation under the new consolidation plan.

While we are aware of various problems which have arisen in implementing the Massachusetts version of “court unification,” we believe it is too soon to draw definite conclusions or to make specific recommendations for legislation.

The nationwide movement for court reform has demonstrated that many problems will arise during the period of initial implementation of court unification. Some difficulties which have created friction elsewhere can be avoided in Massachusetts. For example, because Massachusetts judges are not elected, we appear to have avoided many of the political disputes which have arisen elsewhere.

Standardized Procedure

The adoption of the Massachusetts Rules of Civil Procedure pre-dated court consolidation. Massachusetts has successfully standardized many trial court rules, procedures and forms. The task is not, however, complete.

We still have special rules in domestic relations cases, and we have yet to bring the Land Court under the Massachusetts Rules of Civil Procedure. We recommend that this be done in 1980.

Currently, a special set of rules covering summary process (Chapter 239) in landlord/tenant cases in all departments of the Trial Court is being considered by the Supreme Judicial Court.

Court Personnel

Wherever the unification movement has been implemented there have been some personnel re-adjustments. In Massachusetts the unification statute and the organization of court personnel for the purpose of collective bargaining coincided. It was inevitable that such a coincidence brought about controversies relative to job classification, duties and pay scales. Some of these difficulties have yet to be resolved, and it remains to be seen whether the current pay scale will be adequate to retain the competent personnel necessary to make the system work. Obviously, a decision to change the duties or compensation of a classified court employee now has system-wide implications and is no longer a local matter.

Centralized Administration

In any new system, the centralization of authority in a state court administrator can be expected to cause tensions. As the central office staff is sometimes unfamiliar with, and local staffs are often protective of, long-standing practices, situations do arise where the tensions may be counter-productive. While this may be expected in the early stages of court consolidation, it should not be permitted to continue.

Data Processing

It is difficult at the present time to obtain up-to-date statistics and the significant information concerning the performance of the judicial system. One indication of the success of the Office of the Trial Court Administrator will be its ability to produce such information quickly and accurately. It is imperative that this information be available if an accurate assessment of the success of court unification is to be made.

Assignment of Judges

It would appear that it has been possible to arrange for the transfer of judges from one department of the Trial Court to another without friction. In most cases, such transfers have been voluntary or without complaint.

Centralized Budgets

The amount appropriated for the judicial system for the fiscal year ending June 30, 1979 was \$116,433,296.

For Fiscal Year 1980 the total was \$120,527,489.

For Fiscal Year 1981 the request is \$209,147,484.

State Financing

The original estimates of those who were active in the campaign of court consolidation tended to be overly optimistic and to underestimate the cost of court consolidation to the Commonwealth. Our own projections, while more realistic, have also proven to have been too low.

It seems inevitable that the executive and legislative branches of government, which are charged with providing most of the ways and means for the courts, will resist demands for substantial increases in funding. The executive and legislative branches must concern themselves with the total state budgets and in these times of rapid inflation and increased energy costs, allocating the available resources is no mean task.

If the legitimate interests of the courts are to be advanced, it is necessary for the judicial branch to develop a statesmanlike policy. It is incumbent upon the judiciary to show the legislature that it is indeed efficiently using the judicial budget. A state court administrator in Massachusetts cannot close his eyes to the principle that the legislature has the power to erect and abolish any courts except the Supreme Judicial Court.

Clearly, the wisest course would be for the three branches of government to recognize that the decision as to what amount is necessary to adequately fund a system of justice in the Commonwealth must be shared. Furthermore, it is necessary for the executive and legislative branches to realize that the increased professionalism and service sought to be obtained through court consolidation requires additional funding.

B. A MODEST PROPOSAL FOR JUDICIAL IMPACT STATEMENTS

It has become popular to insist that legislative proposals, and even the proposals of private business, be accompanied by some sort of "impact statement." Those matters of legislation

which involve considerable expenditure of tax revenue should have an "economic impact statement" indicating the total dollars involved in the program. Projects of private business which may cause harm to the environment must now have an "environment impact statement" before the project can proceed.

We are of opinion that the General Court ought to consider the preparation of "judicial impact statements" as part of the legislative process in creating new rights and remedies to be pursued in the courts.

The new rights which have been recognized during recent years are significant, and in some cases the recognition was overdue. We do not criticize the endless efforts of dedicated citizens and legislators to see that justice is served. But we do suggest that as the legislature considers the creation of new rights or remedies, it do so with an eye towards the ability of the courts to handle any resulting increase in their duties.

For the implementation of these new rights and remedies, it is necessary to utilize the personnel, equipment, real estate and budget which is now provided by the General Court. To provide a way leading to justice, without also providing the means to reach the end of the journey, fulfills neither the need nor the promise.

New Private Civil Rights Actions

Since 1871, under the provisions of Title 42 U.S.C. §§ 1971, 1983, 1985 and other sections of the federal code, a citizen had a right to seek injunctive relief and damages in the event that any person, or agency, acting *under the apparent authority of law* interfered with the citizen in the exercise of civil rights, now or hereafter given under federal or state law, and under the state and federal constitutions.

By Chapter 801 of the Acts of 1979, citizens of Massachusetts may commence private actions in the trial courts in any case where it is alleged that another person has by threats, intimidation, or coercion, interfered with or threatened to interfere with the person in the exercise of his/her civil rights. The term "civil rights" is not restricted merely to issues involving race discrimination. For example, a person may feel that his right to free speech has been unduly limited. In such case, he can seek (a) an injunction; (b) other equitable relief; (c) money damages; (d) court costs; and (e) reasonable attorneys fees.

In addition to granting the aggrieved individual a private right of action, the statute provides that the Attorney General may bring a civil action for injunctive or other appropriate equitable relief in behalf of the Commonwealth.

The statute also provides certain criminal penalties. It makes a wilfull civil rights violation at least a misdemeanor, and if bodily injury results, a felony.

The Consumer Protection Experience Chapter 93A (1967-1979)

When the consumer protection statute, G.L. Chapter 93A, was enacted in 1967, it was not anticipated that a whole new world of litigation would result. Initially, it was believed that a statute which empowered the Attorney General to act in behalf of consumers, and to protect them from unfair and deceptive practices, would be sufficient. Those in the consumer movement demanded more.

As the Supreme Judicial Court indicated in *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 699 (1975):

Because of the inability of the Division to handle all the complaints it was receiving, it became clear that private remedies were needed under c. 93A.

The court also cited the introduction of the provisions for the award of attorneys fees and court costs so that persons having individual consumer claims might retain professional advocates to represent them in the dispute. This professional representation, said the court, was a "central premise of our legal system." It was to be encouraged, and also paid for.

The court also made it clear that a claim under Chapter 93A, § 9 in which it was alleged that a consumer suffered loss of money as a result of the use or employment by another person of an unfair or deceptive practice was a "creation of the statute." It is therefore *sui generis*. It is neither wholly tortious nor wholly contractual in nature and is not subject to the traditional limitations of causes of action such as tort for fraud and deceit.

The old concepts of contract and tort law did not necessarily apply if it was a "consumer case." A generation of judicial precedents would thus be necessary to define the new rights.

Cases under Chapter 93A have significantly added to the burden of the trial courts. Many hearings are emotional and

time consuming. The words "unfair and deceptive" encompass an almost unlimited range of meanings.

Most recently in the 1979 Session of the General Court, Chapter 93A, §9 was amended so that it reads in part:

Any person, other than a person entitled to bring an action under section eleven of this chapter, who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder . . . may bring an action . . . for damages and . . . equitable relief.

The 1979 Amendment, Chapter 406 of the Acts of 1979, eliminated the need for the plaintiff to allege that any goods were purchased, any services were given or that any loss of money or property, real or personal, had been suffered.

To what extent this new amendment will spawn an additional round of litigation we cannot tell. It was intended that a person who had been humiliated by a bill collector might have relief and damages against the offending collection agency, a reasonable and desirable objective. The absolute removal of any necessity to show loss of money, or even that there was a consumer transaction involved, will, however, undoubtedly result in numerous cases testing the new waters. In all likelihood, there will be another round of pioneering consumer claims where no money has been lost and no goods purchased.

We advise the General Court that it has become fashionable for attorneys to include a claim for some violation of Chapter 93A in almost any litigation. Plaintiffs are known to complain if such a claim is not made, even in cases which fit traditional contract or tort categories which have long been found useful in administering a just result.

We are now on notice that regardless of the necessity or desirability of remedies such as Chapter 93A, the work of the courts increases in geometric proportions each time a new legal remedy is given, or an existing legal remedy is broadened by amendment.

This observation is not a plea to desist from social progress. We simply point out that with each new measure there must be consideration given to the ability of the judicial system to handle the increasing case load.

There must be an awareness that, especially in these times of inflation where there are so many demands for the tax dollar, the impact of new legislation such as consumer protection and

private civil rights actions must be assessed and funds provided for judicial personnel. The assessment is of far more importance in the case of statutes which provide for the payment of attorneys fees and costs. With a promise that such compensation will be provided, it is to be expected that there will be more interest on the part of the bar in bringing such actions.

When triple damages are possible, as under Chapter 93A, there are additional incentives to take the case to court.

In the earliest consideration of Chapter 93A, it was anticipated that many cases would be adjusted without court intervention. This was to be done by requiring a demand for relief by the consumer, and a reasonable offer of settlement by the merchant. While this feature still is contained in the law, it is increasingly difficult to separate the reasonable from the unreasonable on both sides of the question. Hence, there is a tendency, nourished by the thought of double or treble damages, attorneys fees and costs, to file a complaint in court.

Without doubt, the new private remedy for *any* violation of *any* constitutional, or other "civil" rights presently or in the future conferred by the laws of the United States, or the law of the Commonwealth of Massachusetts, will generate a small litigation boom in our trial courts. The promise of attorneys fees in such cases will encourage people to bring suit whether or not they can afford legal fees.

Designed to achieve the goal of racial justice, and to end violence, and already containing the right to private litigation, this new statute will increase the work of the judicial system.

Under the federal statutes, the private remedy was not given for the enforcement of every civil right, and in the course of time, the federal courts have found it necessary to establish and follow a judicial policy of limiting such actions to the prescribed categories.

CIVIL RIGHTS — ACTIONS AND PENALTIES

CHAPTER 801 of 1979

An Act for the protection of the civil rights of persons in the Commonwealth.

SECTION 1. Chapter 12 of the General Laws is hereby amended by inserting after section IIG, inserted by section 51 of chapter 363A of the acts of 1977, the following two sections:
Section IIH.

Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person or persons whose conduct complained of reside or¹ have their principal place of business.

Section III.

Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section IIH, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

SECTION 2. Chapter 265 of the General Laws is hereby amended by adding the following section:

Section 37.

No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the commonwealth or by the constitution or laws of the United States. Any person convicted of violating this provision shall be fined not more than one thousand dollars or imprisoned not more than one year or both; and if bodily injury results, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than ten years, or both.

¹ So in original; probably should read "complained of reside or". Approved November 16, 1979.

C. JUROR UTILIZATION AND JURY REFORM

G.L. Chapter 234A, popularly known as the "New Middlesex Jury System" became effective in Middlesex County on January 1, 1979. The theory of this concept is threefold. The burden on citizens of extended jury service is reduced; the cost of jury service to the Commonwealth is reduced; and juries are more truly representative of the community.

Class exemptions are eliminated under Chapter 234A. Everyone over eighteen years old who can read and write English and who is eligible to vote for a state representative is eligible to serve. The jury list is drawn from the residence list instead of the voter list. Regulations have been adopted which virtually eliminate any challenge to a venire on grounds of the exclusion from jury service of any distinctive group in the community. Those having one year's experience with the new system can vouch that all sorts of persons never seen before on jury duty are responding to the summons and being empanelled. Doctors, lawyers, firemen, policemen, clergy, students, elderly persons, and physically handicapped persons are now taking their place among the rest of the community in the juror's box.

The term of service for new jurors is shortened to one day or one trial, whichever is less. Most trials last less than three days. Statistically, in Middlesex County, it is unlikely that a juror will be recalled more frequently than once every fifteen years.

Jury service is considered public service and no compensation is paid by the Commonwealth for the first three days of service. An employed juror must be paid his regular salary or wages by his employer for the first three days. Thereafter, jurors are compensated at the rate of forty dollars per day. Special hardship provisions are made for self-employed and unemployed persons. During the first ten months of 1979, juror compensation decreased \$451,727.85 or 63.7% for Middlesex County. This saving is more than the start-up cost of the new system. Nor does this saving include the additional saving accomplished by mailing summonses to jurors instead of having them served by a deputy sheriff.

The yield of jurors under the new system is greater than under the old. That is, a greater percentage of jurors is responding out of the total notified. Utilization percentages, the ratio of jurors called to a courtroom compared to the total

number available in the pool on a given day, are better than the national average.

The system seems to work well not only in the multiple session court at Cambridge but also in the Lowell Superior Court, and the Lowell and Framingham District Courts. While there are juror utilization problems in single or double session courts, these can be minimized with innovative management techniques, such as a telephone system by which jurors can be kept on a standby basis if it is likely that they will not be needed on a given day.

The Judicial Council is informed that legislation has been filed (Senate No. 838) to extend the Middlesex jury system across the Commonwealth. We perceive no need to analyze or comment on each of the sections of this proposed legislation. The Council endorses the concept of improved juror utilization and management which is embodied in Chapter 234A.

D. SENTENCING

In its 1978 report, the Judicial Council discussed proposals for mandatory sentencing, and we rejected the proposals. Because the length and predictability of sentences has continued to be debated, we repeat that we are opposed to mandatory sentencing.

During 1979, Chief Justice Hennessey opposed mandatory sentences and said that they led to flagrant injustices. The Chief Justice has also asserted that there should be no indeterminate sentences, such as we now have. Rather, Chief Justice Hennessey favors presumptive sentences wherein there is a minimum and a maximum sentence established by statute. If a judge does not give the minimum or exceeds the maximum, reasons for the sentence imposed must be given, and an appeal may be taken.

In an attempt to inject consistency into the sentences now being given, the Superior Court has been developing guidelines to assist judges in their sentencing. In the final analysis, however, it is the General Court that has the power and obligation to establish penalties for criminal offenses. Thus, even guidelines adopted by the judiciary should have a statutory foundation.

E. THE PROBATE AND FAMILY COURT

The past year has seen the development and implementation of several innovations. As the collection of support payments is discussed elsewhere in this report, only the area of case management and medical emergencies will be discussed here.

Case Management

Two case management tools are being implemented in the Probate and Family Court Department at the present time: mandatory pre-trials and individual calendaring.

Effective April 1, 1980, each justice of the Probate and Family Court Department will be required to hold pre-trial conferences at least one day a week in contested cases. Although many justices already use pre-trial as a tool, this is the first time it will be required on a system-wide basis. The decision to take this step was made after considering the rising backlog, the favorable response from the bench and bar, and the approximate 50% settlement rate experienced in the past few years.

An individual calendar system has been introduced in the Suffolk Division of the Probate and Family Court on a trial basis for the period of January 1, 1980 to June 30, 1980. Each case presently pending or newly filed will be assigned to one of the justices, who will then retain jurisdiction and control over it. This experiment will be monitored by the Probate and Family Court and will be used to assess the usefulness of individual calendaring in a domestic relations setting. Such a system is presently used in the federal system, but due to differing caseloads, it remains to be seen how this will work in the Commonwealth.

Medical Emergencies

In response to an increasing number of cases involving the making of medical decisions in behalf of mental incompetents, the Probate and Family Court Department has implemented an off-hour judicial response system. Under the system a central telephone exchange relays requests for judicial involvement on weekends and evenings to an "on call" team consisting of a justice, an assistant register and a guardian ad litem. This

system should be effective in responding to this type of medical emergency and the Council endorses it.

F. THE UNIFIED BUDGET

(see attached chart)

Fiscal 1980 was the first year of a centralized budget for the judiciary, and the initial appropriation for fiscal 1980 was \$120.5 million. The House was willing to approve a budget of \$121,474,823 while the Senate recommended \$130,099,980. During the fiscal year, \$13.9 million was added to the judicial budget, increasing it to a total of \$134.4 million for fiscal 1980.

While the transition to a state funded system may have been accomplished in fiscal 1980, the operating costs of the new system (apart from inflation) have not yet been fully recognized.

The judiciary has requested \$209.1 million for fiscal 1981, an increase of 55% over 1980. The Governor has recommended a budget of \$140.8 million, an increase of only 4.8% in the overall.

Although the Governor recommended a 4.8% increase in the overall judicial department budget, instead of the 55% increase requested, there are significant increases in appropriations in those areas where they are most necessary.

Item 0330-2200 — Court Facility Rental

FY 1980	\$ 5,754,784
Asked for 1981	27,570,896
Recommended	5,229,602

When the Commonwealth consolidated the courts in 1978-1979, it owned no courthouses or court facilities. The quarters used for the Supreme Judicial Court, Appeals Court, and Land Court were the only court facilities for which the Commonwealth was accustomed to pay directly.

By appropriations from the state treasury, and also from receipts of tax assessments levied on real estate in the cities and towns, the money to operate court facilities was raised.

THE UNIFIED BUDGET FY 1981

Some Budget Indicators — Court Consolidation — FY 1981 — \$140.9 Million
(Percentages are Approximate — Subject to Action by the General Court)

	The Consolidated Judicial Budget	Appropriated for 1980	Requested for 1981	Amount of Increase Requested	% Increase Req'd	Increase Recommended (Dollars)	% Increase Rec'd	Executive Recommendation FY 1981 to be Appropriated	General Court Actual Appropriation FY 1981
0321	Supreme Judicial Court	\$ 5,782,938	\$ 11,625,413	\$ 5,842,775	101%	\$1,007,706	17%	\$ 6,790,644	
0321-1001	Massachusetts Defenders	2,900,000	7,877,557	4,977,557	171%	880,848	30%	3,780,848	
0321-2000	Mental Health Division	112,374	459,666	347,292	309%	6,118	5.4%	118,492	
0320-0004	Salaries & Expenses	1,514,092	1,926,816	412,724	27%	369,127	25%	1,903,219	
0322	Appeals Court	1,383,767	1,588,057	204,290	14.7%	204,290	14.7%	1,588,057	
0330	Trial Court Administration								
0330-2200	1. Administration and Programs	5,669,459	14,724,230	9,054,771	159%	8,360,888	147%	14,030,347	
0330-0200	2. Court Facility Rental	5,754,784	27,570,896	21,816,112	379%	-(525,182)-	-10%	5,229,602	
0330-0300	3. Recall of Judges	500,000	808,750	308,750	61%	500,000	0%	500,000	
	4. Administrative Staff	675,000	1,479,962	804,962	119%	725,690	107%	1,400,968	
	5. Jury Expense	none	—	5,000,000	—	3,745,000	—	3,745,000	
	6. Counsel to Indigent	none	—	2,500,000	—	4,734,708	—	4,734,708	
	7. Witness Fees	500,000	1,500,000	1,000,000	200%	50,000	10%	550,000	
0330	TOTAL ADMINISTRATION	\$ 11,423,643	\$ 42,295,126	\$30,871,483	270%	\$7,836,306	68%	\$ 19,259,949	

Department Operations

0331	County Departments Superior Court	\$ 16,666,796	\$ 24,532,361	\$ 7,865,525	47%	\$ 63,125	.38%	\$ 16,729,921
0331	TOTAL SUPERIOR COURT DEPARTMENT	\$ 23,914,906	\$ 33,471,654	\$ 9,556,748	40%	\$1,056,784	4.4%	\$ 24,971,690
0332	<i>District Courts</i> Administrative Staff	258,466	553,282	294,816	114%	169,893	65%	428,339
0332	TOTAL	\$ 43,010,485	\$ 64,368,811	\$21,358,326	52%	\$4,939,689	11.5%	\$ 47,950,174
0333	Probate Courts	8,965,418	14,150,557	5,185,139	57%	1,485,324	16.5%	10,450,742
0334	Land Court	1,273,414	1,435,237	161,823	12.7%	53,688	4.2%	1,327,102
0335	Boston Municipal Court	3,604,895	5,286,254	1,681,359	46%	244,691	6.7%	3,849,586
0336	Housing Court	869,992	1,144,874	274,882	31.6%	124,749	14.3%	994,741
0337	Juvenile Court	3,536,467	6,374,672	2,838,205	80%	782,514	22%	4,318,981
0340	District Attorneys	15,245,736	22,788,238	7,542,502	49.4%	1,524,381	9.9%	16,770,117
03	TOTALS	\$134,400,000 ¹	\$209,147,000	\$74,747,000	55%	\$6,489,000	4.8%	\$140,889,777

¹ Includes the \$13.9 Million Reserve Funds Appropriated. The Judiciary would spend 2.39% of the Projected State Budget.

Under G.L. Chapter 29A, section 4 it is provided:

§ 4. Rent of quarters and space

Notwithstanding the provisions of section thirty-four of chapter thirty-five, suitable quarters and space as are now occupied or may in the future be occupied by the judicial branch in buildings owned by a county, city or town shall be rented by the judicial branch from such county, city or town and the rent paid shall be equitably established taking into account the cost of maintenance, repairs, utilities and the annual debt service provided or paid by such county, city or town with respect to such building; provided, however, that in no event shall the portion of the rent established on account of annual debt service paid on the building exceed a fraction, the denominator of which is the total square feet of usable floor space within the building and the numerator of which is the total square feet of usable floor space occupied by the judicial branch. In the event the parties are unable to agree to the rent that should be established, the state superintendent of buildings shall, after hearing if requested by either party, establish such rent, provided however that either party may appeal to the supreme judicial court. The chief administrative justice shall be responsible for negotiating leases between the judicial branch and other parties, subject to the approval of the chief justice of the supreme judicial court, and in compliance with laws and regulations governing state leases.

Notwithstanding the provisions of this section, no payments for rent shall exceed the prevailing rent a commercial establishment would pay for comparable space in that geographic area, excluding that portion of said prevailing rent attributable to property taxes. Added by St.1978, c. 478, § 12.

Section 5 provides for the acquisition of facilities at fair market value.

§ 5. Acquisition of building

If all or substantially all of any building owned by a county, city or town is occupied by the judicial branch, then the chief justice of the supreme judicial court, upon the recommendation of the chief administrative justice of the trial court, if applicable, may recommend to the general court that such building be acquired by the commonwealth. Any such recommendation shall be accompanied by an estimate of the fair market value of the property, and an estimate of the cost of maintenance, repair and necessary operating expenses.

Added by St.1978, c. 478, § 12.

The appropriation of \$5,229,602 for rental of court facilities for the entire Commonwealth, as contemplated by G.L. Chapter 29A, section 4, is not adequate.

Even after deduction of an amount normally included to pay local property taxes, the per square foot rental for space occupation by the judicial branch is supposed to represent a fair market rental.

If there continues to be no agreement on rents for the various facilities, a county, city or town which owns the facilities may file a petition in the Supreme Judicial Court to set the rent.

The entire recommended appropriation of \$5,229,602 would represent less than one half of the rent roll of *one* of the new downtown Boston office buildings.

The early solution of this problem is not possible without the cooperation of all three branches of government. If the Supreme Judicial Court is given this problem, it must determine the rents on a courthouse by courthouse basis, subject to continuing review.

There is a very strong feeling that because the burden of financing the courts has been lifted from the counties, a modest rental (sometimes said to be \$1.50 per square foot) is entirely reasonable. The larger issue, however, deals with the continued maintenance and upkeep, and proper servicing of these facilities.

Published reports indicate that one county threatened to padlock the courthouse, and wanted at least \$6.50 per square foot for rent.

Item No. 0330-03004 Trial Court — Administrative Staff

FY 1980	\$ 675,000
Asked for 1981	1,479,962
Recommended for 1981	1,400,968

A 101% increase in the cost of the staff of the Administrator of the Trial Court is consistent with the mandate of court consolidation. The Commonwealth can expect a very high degree of professionalism from the office of the Administrator on the basis of this budget item.

There have been many predictable problems under G.L. Chapter 211B, §8 dealing with personnel standards other than in the probate department.

Under the authority of G.L. Chapter 150E, §3, the bargaining unit, comprising all non-managerial or non-confidential staff and clerical personnel employed by the judiciary, is currently in the process of choosing a union representative.

We anticipate a lengthy process of collective bargaining and an inevitable crystalization of job classifications and work assignments.

Defense of Accused

Massachusetts Defenders Committee		Counsel to Indigents
Item No. 0321-1001		Item No. 0330-2100
FY 1980	\$2,900,000	\$ —
Asked for 1981	7,877,577	2,500,000
Recommended for 1981	3,780,848	4,734,708

The defense of indigent and semi-indigent persons accused of criminal offenses, at public expense, is constitutionally mandated.

\$7,515,556 is recommended for defense in this class of cases for FY 1981. A total of \$10,377,577 was requested.

The shift from the overburdening of the Massachusetts Defenders Committee to the use of private attorney panels is apparent from the Governor's budget recommendations.

Item No. 0330-02003 — Recall of Judges

FY 1980	\$500,000
Asked for 1981	808,750
Recommended for 1981	550,000

Where appropriate, in the view of the chief justices involved in court administration, it is sensible to make use of retired justices who are capable of handling over-loaded calendars. The financial aspect of such a program is all to the benefit of the taxpayer and experienced jurists, whose service must be approved by a chief justice, can be made available for limited use.

Item No. 0336 Housing Court

FY 1980	\$ 869,992
Asked for 1981	1,144,874
Recommended for 1981	994,741

The statistics of the trial court department amply demonstrate that in the case of the Housing Court, especially at Boston, there is a need for an additional appropriation.

II. COMPETENCY TO STAND TRIAL

HOUSE . . . (1979) . . . No. 5328

AN ACT RELATIVE TO DETERMINING COMPETENCY OF A DEFENDANT TO
STAND TRIAL.

*Be it enacted by the Senate and House of Representatives in General
Court assembled and by the authority of the same, as follows:*

- 1 Sub-paragraph (A) of section 15 of chapter 123 of the General
- 2 Laws as amended by chapter 569 — Sections 5 to 9 of the Acts of
- 3 1973, is further amended by inserting after the second sentence
- 4 of said sub-paragraph (A) the following sentence: —
- 5 “In the event that a qualified physician is not available, a justice
- 6 of the trial court may order the defendant committed to a facility
- 7 for a period not to exceed 3 days for the purpose of having such
- 8 examination conducted.”

House No. 5328 would amend G.L. Chapter 123, §15(a), which presently requires the court to order an examination of the criminal defendant by a qualified physician if there is a doubt as to whether a defendant is competent to stand trial or is criminally responsible due to mental illness.

The current practice is to have such examination made by a court psychiatrist where one is available, or to call in a psychiatrist for the purpose of making such an examination.

The apparent purpose of the bill is to provide that if a court psychiatrist is not available, and a qualified physician is not available, the judge may order the defendant committed to a public facility for three days to have an examination conducted.

Chapter 123, §15(a) now provides that before the court can make a twenty day commitment order, there must first be an examination by a qualified physician. The provision for a three day commitment would result in a rapid transfer of the individual to the mental health facility for three days in cases where no qualified doctor was able to make an examination at the courthouse or place of detention.

The “public facility” at which the three day examination would be conducted is a public institution or facility “for the care and treatment of mentally ill or mentally retarded persons, except for the intensive care unit for women *and the Bridgewater State Hospital.*” See Chapter 123, §1 “Definitions” (emphasis supplied).

Under present law (Chapter 123, §15(b)), the twenty day commitment can be to Bridgewater if a male is involved and strict security is necessary. (See also Chapter 123, §13 for authority to transfer certain persons to Bridgewater.)

It can hardly be doubted that it is within the inherent power of the court to ascertain whether an accused person who appears before it is competent to stand trial or to understand the pre-trial proceedings which are directed against him.

An earlier statute stated:

In order to determine the mental condition of any person coming before any court of the Commonwealth, the presiding judge may, in his discretion, request the department (of Mental Health) to assign a member of the medical staff of a state hospital to make such examinations as he may deem necessary.

See former G.L. Chapter 123, §99, now repealed.

Of this statute the court said in *Sullivan v. Judges of the Superior Court*, 271 Mass. 435, 437 (1930):

The statute provides a simple efficient and impartial method of determining a subject which apart from the statute is within the jurisdiction of the court. Whenever genuine question arises in the trial of a cause whether a party to an action is capable of conducting the litigation by reason of minority or mental incapacity, it is the duty of the court to ascertain the fact and in case a finding is made that such incapacity exists to cause some competent person to be appointed to conduct the litigation.

The court observed of the earlier statute, as it could now observe of G.L. (Ter. Ed.) Chapter 123, §15, as amended, that:

The statute provides highly appropriate machinery for the performance of a general duty resting on the court.

Accordingly, a person could be referred to any appropriate agency, at public expense, for the purpose of determining whether he is competent to stand trial or to plead or conduct a defense.

Chapter 123 is merely an “appropriate machinery” which would usually be followed.

Is House No. 5328 Practical?

We are of opinion that the threshold inquiry by a psychiatrist as to whether a defendant in a criminal case is competent to stand trial or is not criminally responsible by reason of mental illness or mental defect, should not necessarily require a commitment to a state hospital.

A three day commitment, or any commitment, is called for if the judge "has reason to believe" that observation in a state hospital (or Bridgewater)

is necessary in order to determine whether mental illness or mental defect have so affected a person that he is not competent to stand trial or not criminally responsible for the crime or crimes with which he has been charged.

There is grave doubt that much can be accomplished by an actual commitment for three days.

We are informed that in a number of cases the twenty day commitment authorized under Chapter 123, §15(b), fails to produce the necessary conclusions and that such commitments are renewed for an additional twenty day period in a large number of cases.

If an examination cannot be conducted at the courthouse, or place of detention, we do not concur in a statutory mandate that a person, as to whom there is a doubt, shall in the usual case be committed for three days for the threshold inquiry.

If the policy of the Department of Mental Health is to provide community based mental health services, and to phase out large institutions, it would be consistent to have such preliminary inquiry take place at the local level and to call for institutionalization only when absolutely necessary.

We believe that a court may, without any statutory authority, send a defendant to a state hospital for the purposes of the examination specified in G.L. Chapter 123, §15(a). The volume of such cases would be small and would impose a lesser burden on all concerned than a three day commitment.

If the threshold examination at the hospital indicates that an actual commitment is necessary, the court can proceed under Chapter 123, §15(b) and order a twenty day observation period.

It concerns us that a citizen might be committed for any period, even in the case of a minor offense, and in particular an

offense under the new Chapter 209A, which deals with domestic strife, among other things.

The impact of a mental hospital commitment is severe.

We are informed that in most cases, the report of the court psychiatrist, after the threshold inquiry, is that the defendant appears competent to stand trial.

If our information is correct, the summary commitment should be avoided. Possibly a psychiatrist should be sought at public expense, who could deal with the case as quickly as possible if a threshold evaluation at the nearest state facility is not feasible.

We refrain from making a specific recommendation in this matter, feeling that the court is now in possession of inherent power to order examinations, and that commitments for this purpose should be avoided except as a truly last resort, when all other possibilities have been exhausted.

III. BLOOD GROUPING TESTS (HLA) TO DETERMINE PATERNITY

HOUSE . . . (1979) . . . No. 5501

AN ACT REQUIRING THAT A CERTAIN BLOOD TEST BE ADMINISTERED IN
PATERNITY SUITS.

*Be it enacted by the Senate and House of Representatives in General
Court assembled and by the authority of the same, as follows:*

- 1 Notwithstanding the provisions of any law to the contrary any
- 2 defendant in a paternity suit shall be administered a blood test
- 3 identified as the H.L.A. test by a medical doctor chosen by the
- 4 presiding justice of the court in which the suit is brought.

The use of blood grouping testing in a proceeding to determine the question of paternity is already covered by G.L. Chapter 273, §12A which reads as follows:

In any proceeding to determine the question of paternity, the court, on motion of the alleged father, shall order the mother, her child and the alleged father to submit to one or more blood grouping tests, to be made by a duly qualified physician or other duly qualified person, designated by the court, to determine whether or not the alleged father can be excluded as being the father of the child. The results of such tests shall be admissible in evidence only in cases where definite exclusion of the alleged father as such father has been established. If one of the parties refuses to comply with the order of the court relative to such tests, such fact shall be admissible in evidence in such proceeding unless the court, for good cause, otherwise orders.

The most common legal proceeding for the adjudication of paternity is that commenced under Chapter 273, §12. In 1975, in the case of *Commonwealth v. MacKenzie*, 368 Mass. 613, the Supreme Judicial Court held that a criminal proceeding against a man only for fathering a child out of wedlock denied the man equal protection of the law, in violation of the Massachusetts Constitution and the Fourteenth Amendment to the

Constitution of the United States. After this decision, section 11 of Chapter 273 was repealed, and what now remains is essentially a judicial proceeding brought to adjudicate paternity so that a further judicial order can be entered under Chapter 273, §15 for the support of the child.

It becomes important to recognize that the proceeding to adjudicate paternity is non-criminal. There is no punishment as there was before 1975 for fathering a child out of wedlock. The criminal sanction only comes into play when the adjudication has been made and the proven father neglects or refuses to make a reasonable contribution for the support and maintenance of the child. Any spouse or parent who fails, without just cause, to support his or her minor child, faces criminal penalties under G.L. Chapter 273, §1. But again, the penalty is imposed only for failure to care for the child.

There could be other proceedings in the courts to establish paternity where no support issue was involved. The tenor of House No. 5501 makes it appear that it could be applied in cases other than those brought under Chapter 273, §§1, 12.

Scope of the Problem

A joint study by the AMA-ABA published in 1976 included some startling statistics, not the least of which was the fact that between 1961 and 1970 there were enough illegitimate children born in the United States to populate a city the size of Los Angeles, and that there were more than 1,700,000 illegitimate births in a five year period. *See Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 Fam. L. Qtly. 247 (1976).

It has been recognized that except perhaps regarding inheritance, a state may not constitutionally treat an illegitimate child differently than it treats a legitimate child.

It is a national social goal, apart from the legal status or constitutional issues, that more children born out of wedlock should have legal relationships with their fathers in all cases. The AMA-ABA report notes:

. . . the gulf between the abstract principle and the realization of legal equality between legitimate and illegitimate children continues to loom wide. Owing largely to defective and antiquated paternity ascertainment procedures, only a very small fraction of illegitimate children now achieve legal relationships

with their fathers. All gains in substantive rights will mean little or nothing if our procedures for ascertaining paternity are not improved.

Enacted in 1975, Pub. L. 93-647 has injected federal funds and interest into this area. Each state is required to develop an appropriate plan, in accordance with HEW standards, for the ascertainment of paternity (and child support enforcement) within the framework of the A.F.D.C. program. The applicability of the federal legislation, however, is not limited to the welfare area and extends to all disputed paternity cases.

Given the substantive legal equality mandated by the United States Supreme Court and Pub. L. 93-647, fundamental reform of the paternity action has become the most pressing task in the area of illegitimacy. Reform is needed to provide a responsible parent for the illegitimate child as well as to protect men who are falsely convicted in what some states anachronistically continue to view as a criminal prosecution. (The cost of even relatively extensive blood typing procedures is dwarfed by the potential cost of child support for eighteen years or more).

Reform must come on two levels: We need a new procedural framework for the paternity action improving both quality and volume and, within that new framework, medical evidence must pay the cardinal role.

Id. at 250-55.

It is self-evident that House No. 5501 is designed to further facilitate the process of determining the paternity of illegitimate children. By providing that the court may order the alleged father to undergo the HLA test, House No. 5501 ensures that a very effective blood test will be at the disposal of courts attempting to resolve the issue of paternity.

What is the HLA Test?

The Human Leukocyte Antigens (HLA) test is the latest development in the area of immunohematology. Beginning in 1900 with the discovery of the A, B, AB and O classification, the science of blood grouping has advanced to the point where there are presently over sixty distinct tests capable of excluding a wrongly accused man as the father of a particular child. The 1976 AMA-ABA report suggested that through the use of just six of these systems, it is possible to exclude a wrongly accused man in 63-72% of the cases, depending upon the race of the parties. Furthermore, the committee reported that through the

addition of the HLA test, the likelihood of excluding a wrongly accused man increased to 91-93%.

The process of excluding a wrongly accused man is relatively simple. Blood tests are performed on all three of the parties. By comparing the blood types of the mother and child, it is possible to determine which characteristics the child received from the mother and which traits it must have received from the true father. Then, the putative father's blood is examined for those characteristics. If the putative father lacks them, he is excluded as the true father because a person's blood traits are inherited from both parents.

The special significance of the HLA test, however, is not its ability to exclude wrongly accused males in 78-80% of the cases, but its unique ability to produce a "probability of paternity" index for those males not excluded. Other tests are unable to yield a probability index due to the frequency with which particular traits occur in the population. For example, 45% of the population belongs to Group O and 42% to Group A. Obviously, the fact that both the putative father and the child belong to one of these groups has little relevance to the question of paternity.

The HLA test, which is actually a tissue test, is much more discriminating. Experts have forecast that eventually blood and tissue characteristics will be found to be as unique to a person as his or her fingerprints. But even today, no two people in a thousand will share exactly the same presently identifiable traits. That only one person in a thousand will have the same blood type as the true father makes it possible to compute a "probability of paternity" index using the Essen-Moller version of Bayes' theorem. First, the probability of the putative father and the known mother producing a child of the specified characteristics is calculated. Then the probability of such a child being born of the known mother and a random man is computed. The putative father's "probability of paternity" is the ratio of the first figure to the sum of the probabilities of both men.

Although the HLA test is widely accepted within the medical field, courts have been reluctant to allow its use as positive evidence of paternity. This reluctance is based on the belief, not unfounded, that juries, and even judges, are already too often disposed toward fixing paternity on defendants. This belief is borne out by the cases of *Berry v. Chaplin*, 47 Cal.

App.2d 652, 169 P.2d 442 (1946) and *Commonwealth v. D'Avella*, 339 Mass. 642, 162 N.E.2d 19 (1959). In the former case, a jury, and in the latter case a judge, found the defendant to be the father notwithstanding undisputed medical evidence to the contrary. Cases such as these have caused many to believe that to allow a finder of fact to consider probability of paternity evidence would be highly prejudicial. Nevertheless, as is pointed out in the AMA-ABA report, estimates of the probability of paternity based upon the HLA test are admissible in evidence in many foreign countries.

It is necessary to use statistical analysis to attempt to make mathematically valid estimates of the likelihood of paternity, and there are various factors that must be considered in assessing the validity of the estimation.

The report states:

The difficulty judges, juries, and lawyers may experience in interpreting statistical evidence correctly, and possible due process issues under the Fourteenth Amendment of the U.S. Constitution arising in the light of the assumptions just discussed, raise questions regarding the indiscriminate use of such evidence. As indicated in the Recommendations, the matter should be studied further and appropriate safeguards need be developed to guard against possible misinterpretation of calculations of "likelihood of paternity." It may also be noted that the relatively high exclusion rates that will be produced by the application of the recommended systems will reduce substantially the need for this type of evidence.

In a study of 1,000 paternity cases, reported in 16 Journal of Family Law, page 543, HLA testing was applied after the original ABO test did not exclude the alleged father. It was concluded:

25% were excluded as not the true fathers by HLA;
64% were identified as the true father by HLA; and
10% could not be determined by the tests.

A 90% probability was claimed for those identified as the true fathers.

The report concluded that:

In practical terms, the ABO red cell test is the simplest and least expensive test for exclusion of paternity, and should be the one used initially. Since this test excludes less than 10% of the putative fathers, most of the cases would still be disputed. This

article has shown that in 1,000 such cases of non-exclusion by ABO, 90% of the cases can be resolved to the extent that they are classified as either excluded (25% of the putative fathers) or non-excluded, together with a relatively high percent of probability of paternity (90%). By selectively adding other tests to the HLA testing, it would be possible to increase the percent probability of paternity and to exclude some fraction of the males who fall in the non-exclusion category. However, as this article demonstrates, the HLA test provides, by itself, a very powerful, effective new tool in cases of disputed paternity.

The commentators seem to suggest that if cost and time were no object, a course of 62 separate tests would establish non-paternity for about 98% of falsely accused men but that such a course of 62 tests is both impractical and too costly.

Uniform Act

The Uniform Act has been recommended by the Commissioners on Uniform State Laws, but it has not been widely adopted. Its provisions are as follows:

UNIFORM ACT ON BLOOD TESTS TO DETERMINE PATERNITY

§1. **AUTHORITY FOR TEST.** — In a civil action, in which paternity is a relevant fact, the court, upon its own initiative or upon suggestion made by or on behalf of any persons whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any parties refuse to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

§2. **SELECTION OF EXPERTS.** — The tests shall be made by experts qualified as examiners of blood types who shall be appointed by the court. The experts shall be called by the court as witnesses to testify to their findings and shall be subject to cross-examination by the parties. Any party or person at whose suggestion the tests have been ordered may demand that other experts, qualified as examiners of blood types, perform independent tests under order of court, the results of which may be offered in evidence. The number and qualifications of such experts shall be determined by the court.

§3. **COMPENSATION OF EXPERT WITNESSES.** — The compensation of each expert witness appointed by the court shall be fixed

at a reasonable amount. It shall be paid as the court shall order. The court may order that it be paid by the parties in such proportions and at such times as it shall prescribe, or that the proportion of any party be paid by (insert name of the proper public authority), and that after payment by the parties or (insert name of the public authority), or both, all or part or none of it be taxed as costs in the action. The fee of an expert witness called by a party but not appointed by the court shall be paid by the party calling him but shall not be taxed as costs in the action.

§4. EFFECT OF TEST RESULTS. — If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence. If the experts conclude that the blood tests show the possibility of the alleged father's paternity, admission of this evidence is within the discretion of the court, depending upon the infrequency of the blood type.

§5. EFFECT ON PRESUMPTION OF LEGITIMACY. — The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, show that the husband is not the father of the child.

§6. APPLICABILITY TO CRIMINAL ACTIONS. — This act shall apply to criminal cases subject to the following limitations and provisions: (a) An order for the tests shall be made only upon application of a party or on the court's initiative; (b) the compensation of the experts shall be paid by (insert name of proper public authority) under order of court; (c) the court may direct a verdict of acquittal upon the conclusions of all the experts under the provisions of Section 4, otherwise the case shall be submitted for determination upon all the evidence.

§7. UNIFORMITY OF INTERPRETATION. — This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§8. SEVERABILITY CLAUSE. — If any part of this act is declared invalid the remaining portion shall continue in full force and effect and shall be construed as being the entire act.

§9. SHORT TITLE. — This act may be cited as the Uniform Act on Blood Tests to Determine Paternity.

§10. TIME OF TAKING EFFECT. — This act shall take effect . . .

As can be seen, section 1 of the Uniform Act allows the court, without consent of the alleged father, to order such

“blood tests” as the court may determine. The HLA test could thus be included.

It is to be carefully noted that under section 4 of the Uniform Act, the court could admit evidence which showed the “possibility” of the alleged father’s paternity. This is not possible under present Massachusetts statutes.

Necessity for Legislation

In order for the Council to make a recommendation as to House No. 5501, it is necessary to consider each of the possible effects of the bill individually. The following discussion will briefly state the possible changes in the law implicated by House No. 5501 and render an opinion thereon.

First. If it is desired only that the court may order the HLA test on motion of the alleged father, no legislation is necessary. Section 12A already provides that the court may order blood tests upon motion of the alleged father. At most, a simple amendment to section 12A, which merely adds the words “including the HLA test,” after the words “blood grouping tests,” would be appropriate, although not necessary.

If, however, the General Court wishes to go further and to permit the court to order blood grouping tests in all paternity cases, whether or not requested by the alleged father, a statute such as House No. 5501 would be required.

The Uniform Act provides in section 1 that in civil actions the court may order blood tests upon its own motion, upon the motion of the parties, or at the suggestion of one, or in behalf of one whose blood is involved. In criminal actions, the tests may be ordered upon the court’s own initiative or upon the motion of a party.

Second. According to section 12A, an alleged father may request the court to order blood tests, and if so requested, the court must order the mother and child to undergo the tests. Nevertheless, a person may refuse to abide by the order. But if a person does refuse, the judge has the option of allowing such refusal to be used as evidence in the proceeding.

The Uniform Act, section 1, provides that if any party refuses to submit to the tests, the court may enforce its order as justice requires, including the discretionary power to resolve the issue of paternity against the recalcitrant party. Should the General Court determine that section 12A needs stronger en-

forcement provisions, the approach of the Uniform Act should be considered.

Third. Section 12A provides that the results of blood grouping tests are admissible in evidence only if the alleged father is thereby excluded as the true father of the child involved. Because of the injustice involved in allowing a finder of fact to ignore medical evidence of exclusion, the Supreme Judicial Court ruled in *Commonwealth v. D'Avella, supra*, that where properly conducted blood tests exclude the alleged father, the results are conclusive evidence of non-paternity.

If no further legislation were enacted, it would appear that the enactment of House No. 5501 would allow the HLA test to be administered and accord it the same evidentiary value as other blood tests. That is, the results would be admissible only to exclude the putative father.

It is possible, however, that the proposed legislation is intended to make a more radical change in the law. The General Court may intend that the putative father be tested in every case and the "probability of paternity" index submitted into evidence. If this is the case, a determination must be made as to the lowest index which will be admissible. It is suggested that some explicit standard be included in the bill rather than left to the courts for determination.

The Uniform Act responds to this problem by providing that uncontested evidence of exclusion is conclusive of non-paternity but allowing probability evidence where warranted. Presumably, where the tests can do no better than establishing a 50% chance of paternity, the evidence would be excluded, but where the index is as high as 98%, as is possible with HLA testing, probability evidence would be admissible.

Constitutional Issues

If House No. 5501 is read to allow the introduction of a "paternity index" the constitutionality of the bill must be resolved. In *Schmerber v. California*, 384 U.S. 757 (1966) the Supreme Court rejected arguments that the forcible taking of blood from a person suspected of driving while under the influence of alcohol violated the accused's privilege against self-incrimination. The Court reasoned that the extraction of blood under these circumstances was in no sense compelling the ac-

cused to provide the state with communicative or testimonial evidence.

House No. 5501 also involves the fourth amendment privilege against unreasonable searches and seizures of one's person. This privilege has long been viewed as requiring the detached, impartial decision of a magistrate prior to the granting of a writ in all but exigent circumstances. *Id.* 770. Under House No. 5501, the test will be ordered by a judge. This will not be a detached and impartial decision but rather a mandatory rubber stamp of the legislative determination that such tests should be performed. Any doubt as to the constitutionality of House No. 5501 could, of course, be removed by granting judges the power to order such tests where warranted rather than legislating that such tests "shall be administered."

Conclusion

Until there is a legislative determination with respect to the policy of the Commonwealth as to the use of blood grouping tests, including HLA, we are of opinion that the proposed House No. 5501 should not be enacted. If the HLA test is to be just one more (and perhaps a better) test in the series of possible tests, we need no new legislation. If, however, there is to be a significant change in policy, we direct attention to the language of the Uniform Act and to the concept of probability of paternity evidence as a matter of affirmative proof. Should a change in policy be determined, section 12A would need substantial revision. The statutes in this regard should not be inconsistent in any event, and the proposal of House No. 5501 does not peacefully co-exist with section 12A.

IV. LAND RECORDS

- A. Project on Public Records Concerning Land
- B. Procedural Changes in Recording of Land Court Title Records
- C. Changes in Conveyancing Practices for Registered Land
- D. Opposition to Current Proposals
- E. Conveyancing Legislation Recommended
- F. Land Records Advisory Committee
- G. Technical Improvements in Land Court Administration

HOUSE . . . (1979) . . . No. 3510

AN ACT PROVIDING FOR THE IMPROVEMENT OF PUBLIC RECORDS CONCERNING LAND IN THE COMMONWEALTH.

1 *Whereas*, The deferred operation of this act would tend to defeat
2 its purpose, which is to provide for a land records improvement
3 program in time to be eligible for a federal demonstration project
4 grant, therefore it is hereby declared to be an emergency law,
5 necessary for the immediate preservation of the public con-
6 venience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 4 of Chapter 7 of the General Laws, as
2 amended by Chapter 704 of the acts of 1969, is hereby amended by
3 striking the semi-colon after the word “commonwealth” in line 15
4 of the second paragraph and inserting in place thereof the
5 following: — and, in matters affecting coordination of procedures
6 for mapping and for keeping of public records concerning land, of
7 units of the county and municipal governments of the common-
8 wealth.

1 SECTION 2. Chapter 7 of the General Laws is further

2 amended by inserting at the end thereof the following new
3 section: —

4 *Section 39.* The commissioner shall conduct a land records
5 improvement program for the commonwealth, for the purposes of
6 providing: 1) more efficient retrieval of public records for real
7 estate transactions; 2) standard formats for public records
8 concerning land parcels, including records for real estate
9 assessment, tax collection, acquisition of land or easements, and
10 administration of regulations governing subdivision, development
11 or use of land; 3) rapid access to the basic public records required
12 for land management, both public and private, and for analysis of
13 land-based information for public policy development and
14 planning; and 4) a foundation of legal and technical resources for
15 modernizing land title recordation procedures.

16 To advise and assist the commissioner in the conduct of the land
17 records improvement program there is hereby established in the
18 executive office of administration and finance the land records
19 advisory committee consisting of the judge of the land court or his
20 designee, the chief engineer of the land court, and ten members to
21 be appointed by the governor, including at least one representa-
22 tive of each of the following fields of expertise: recording of deeds,
23 conveyancing, surveying, property assessment, environmental
24 protection, land use planning, and municipal administration. The
25 chairman and vice chairman shall be designated by the governor
26 after consultation with the commissioner of administration and
27 the judge of the land court. The members, chairman and vice
28 chairman shall serve until removed by the governor or until three
29 months after the end of his term of office.

30 The commissioner shall prepare, with the advice and assistance
31 of the land records advisory committee, reports and recommen-
32 dations to the governor, the chief justice and the general court on
33 or before December 1, 1980, and revisions of said reports and
34 recommendations following the end of each fiscal year thereafter,
35 including evaluations of results of previous recommendations, on
36 the following subjects:

37 (1) procedures for improving storage and retrieval of public
38 records relating to real estate by the use of uniform and combined
39 indexes thereto based upon a system of geographic identifiers
40 relating to units of land, as an alternative to systems based upon
41 the names of persons;

42 (2) changes in the laws and customs relating to the recording of
43 deeds and other instruments of the issuance and maintenance of
44 certificates of title that may be necessary or desirable to accomplish
45 the foregoing;

46 (3) changes in other laws relating, substantially or procedurally,
47 to the creation, ownership and transfer of rights in real estate,
48 including Chapter 185 of the General Laws, that might, without
49 undue prejudice to the purposes of such laws, reduce the length and
50 the expense of title examination and the risks inherent in purchases
51 of real estate;

52 (4) a program for production and maintenance of an integrated
53 system of multi-purpose land parcel index maps, to replace the
54 separately designed, single-purpose maps presently in use for
55 administration of property assessments and taxation, zoning,

wetlands restrictions, conservation restrictions, agricultural preservation restrictions, public works programs, etc.; and

(5) organization, work program and funding required for conduct of a pilot project to test and demonstrate the benefits and costs, public and private, of an integrated land and resources information system based on the identification of land parcels.

The commissioner shall establish, and amend from time to time, with the advice and assistance of the land records advisory committee, plans, guidelines or standards, as appropriate, for improvement of maps and land records in the commonwealth, and evaluations of the results, covering the following operations, among others:

(1) maintenance of records concerning the effects of ordinances, bylaws, regulations, licenses, restrictions or permits of state or local governments upon the use, subdivision, development or environmental conditions of individual land parcels;

(2) maintenance of elements of a land parcel data base by agencies of state or local government that administer laws or regulations affecting land parcels; and

(3) any surveying, mapping of extended areas, or provision of geodetic control under the direction of a state agency.

The chairman of the land records advisory committee may execute agreements with public or private organizations for doing or sharing work or expense in furtherance of the purposes of both parties. All departments, divisions, boards, bureaus, commissions and other governmental units of the commonwealth and every county, city and town are authorized to make available to the advisory committee such data as they have which the committee may seek, and to execute agreements with the chairman of the committee. The chairman and vice chairman may receive compensation for such part-time duties as may be assigned by the commissioner, subject to appropriation. All other members of the advisory committee and its task forces shall serve without compensation, but may be reimbursed for expenses incurred by them in the performance of their duties.

SECTION 3. The commissioner of administration shall assume responsibility for the reports and files of the land records commission funded in the department of community affairs by Chapters 363 and 423 of the Acts of 1974.

SECTION 4. Chapter 36 of the General Laws is hereby amended by inserting after Section 13 the following new section: —

Section 13C. The mayor and council of a city, or the selectmen or manager and council of a town, may submit index maps of the territory of that city or town, and such other information as may be required, to the commissioner of administration in accordance with rules promulgated from time to time by him. The indications of boundaries and index numbers on said maps shall be for the purposes of identifying instruments that establish title or rights for each ownership parcel or other area affected by a right of way, easement, restriction or other continuing agreement by an owner,

distinguishing them from instruments that establish title or rights for the abutting or other parcels or areas, and such other purposes as may be specified in said rules. If the commissioner determines that the maps and assignments of index numbers are in compliance with said rules, and that the register of deeds for the registry district in which the city or town lies has offered evidence that he is prepared to maintain a geographic index for said territory, the commissioner shall approve the maps and index numbers as being adequate for these purposes.

Upon such approval, sets of the maps bearing the index numbers shall be delivered to the engineering department of the land court, to the city or town and to said register of deeds, who shall post a notice of such receipt in his registry, and the city or town shall send to each taxpayer of record therein, and to the owner of any property that is exempt from taxation, a copy of the map, or portion thereof, that shows his land.

The commissioner shall designate an office of state, county or municipal government to maintain the approved index maps of a city or town constantly up to date, to revise the index numbers as required, and to deliver copies of any changed portions of the maps to the other public agencies listed in the preceding paragraph, in accordance with said rules.

Said rules may prescribe (1) purposes and methods of preparing and distributing index maps that show the locations of land in relation to the boundaries and index numbers of parcels and groups of parcels, (2) methods of altering, prospectively, the size, shape or index numbers of parcels or other areas affected by rights of way, easements, restrictions or other agreements by owners, if the boundaries of such parcels or other areas are incorrectly shown or altered by conveyance or otherwise, and (3) methods of establishing for each approved index map the geographic extent of land affected by a notice that refers to a parcel index number displayed thereon, under the provisions of Section 4 of Chapter 183 of the General Laws. No such rules or changes thereto shall be adopted less than ninety days after the transmission of a draft of the same to the land court, the registers of deeds of the commonwealth, and the mayor, manager of board of selectmen of every city and town having a population of over 20,000 in the latest federal census, for their review and comment.

SECTION 5. The first sentence of Section 14 of chapter 36 of the General Laws is hereby amended to read as follows: —

When a register of deeds has received one or more index maps from the commissioner of administration, pursuant to Section 13C, he shall add a column with the heading, "Geographic Index Number."

SECTION 6. Section 25 of Chapter 36 of the General Laws is hereby amended by adding the following paragraph: —

When a register of deeds has received one or more index maps from the commissioner or administration, pursuant to Section 13C, he shall keep a single, composite geographic index of all deeds or other instruments subsequently received affecting land in his

7 district that has been assigned a parcel index number or numbers
8 on said maps, divided into eight columns, with headings as follows:

City or Town (showing code no.)	Geo- graphic Index Number	Date of Recep- tion	Type of Instru- ment	Grantors	Grantees	Book	Page
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1 SECTION 7. Section 26 of Chapter 36 is hereby amended to
2 reads as follows: —

3 Unless a deed or other instrument which he is by law required to
4 record bears a recital or an endorsement by the party presenting it
5 from which it appears that all the land affected thereby is in a city
6 or town for which there are index maps, he shall, and not-
7 withstanding any such recital or endorsement he may, within
8 twenty-four hours after it is left for record, cause the name of each
9 grantor, the grantee or other party thereto be entered at length
10 and alphabetically in the appropriate index, and in the appropriate
11 column, if any, the name of the town where the land described in
12 the instrument lies, if the same is therein disclosed. Within a
13 reasonable time after such instrument has been recorded, he shall
14 affix to entry the number of the book and leaf or page where
15 recorded.

16 If it appears that any of the land affected has been assigned a
17 parcel index number on an index map approved by the
18 commissioner of administration pursuant to Section 13C, he shall,
19 within such twenty-four hours, cause the foregoing entries to be
20 made in the geographic index, arranged numerically and
21 chronologically according first to the code numbers established by
22 the commissioner of administration for the cities and towns; and
23 arranged thereunder in the order of the parcel index numbers, and
24 arranged thereunder in the order in which the deeds or other
25 conveyances to which they refer were left for record. A deed or
26 other instrument that indicates a new parcel number for any of the
27 land affected which is a change from the number or numbers
28 shown on the most recent index map shall have a separate entry
29 shall include a cross-index to the proceeding or succeeding number
30 for such land.

1 SECTION 8. The first sentence of Section 28 of Chapter 36 is
2 hereby amended to read as follows: —

3 Each register shall annually, at the expense of the county, cause
4 competent persons to make copies of the indexes of the preceding
5 year. Indexes of grantors or grantees shall be classified by their
6 respective surnames in alphabetical order, and arranged
7 thereunder in the order in which the deeds or other conveyances to
8 which they refer were left for record. He may also cause the
9 Christian names of the grantors and grantees, as well as their
10 surnames, to be arranged in alphabetical order in such lists. Such
11 copies shall in other respects be in the form required for the
12 original indexes.

1 SECTION 9. Section 29 of Chapter 36 of the General Laws is

2 hereby amended by adding the following words at the end of the
3 first sentence: —
4 and of the index maps of any part thereof.

1 SECTION 10. Section 81M of Chapter 41 of the General Laws,
2 as most recently amended by Section 2 of Chapter 884 of the Acts
3 of 1969, is hereby further amended by adding after the semi-colon
4 following the word "subdivision" in line 15 the following: —
5 for establishing the records required both for effective
6 management of municipal services and for geographic indexing of
7 land title and other public data;

1 SECTION 11. Section 81Q of Chapter 41 of the General Laws,
2 as appearing in Section 7 of Chapter 674 of the Acts of 1953, is
3 hereby amended by adding after the comma following the word
4 "therein" in line 15 the following: —
5 and for the assignment of numbers to lots, which may require a
6 new index number for each lot proposed to be newly created or to
7 have its boundaries changed in any way, selected in accordance
8 with rules prepared by the commissioner of administration
9 pursuant to Section 13C of Chapter 36.

1 SECTION 12. Section 4 of Chapter 183 of the General Laws is
2 hereby amended by adding the following paragraph at the end: —
3 No instrument presented for record more than sixty days after
4 the posting of notice of an index map, as provided in Section 13C
5 of Chapter 36, shall, whether or not accepted for record, be valid as
6 against any person except as aforesaid, with respect to any land
7 shown on such index map, unless, and only to the extent that, it
8 bears on its face the index number or numbers of parcels having
9 boundaries that contain such land. The interpretation of such
10 index maps shall be subject to rules issued pursuant to Section 13C
11 of Chapter 36.

1 SECTION 13. The first sentence in the first subparagraph of
2 Section 38 of Chapter 262 of the General Laws is amended to read
3 as follows: —
4 If the paper contains more than one page, at the rate of one
5 dollar for each page after the first; if it contains the names of more
6 than two parties thereto other than spouses of parties, an
7 additional fee of seventy-five cents shall be charged for indexing
8 the names of the additional parties, and if the paper contains one or
9 more parcel index numbers, an additional fee of seventy-five cents
10 each shall be charged for indexing the paper in the geographic
11 index.

1 SECTION 14. The provisions of sections four through thirteen
2 of this Act shall be deemed severable from sections one, two and
3 three. If any of the provisions of either portion of this Act shall be
4 held unconstitutional by a court of competent jurisdiction, the
5 provisions of the remaining portion of this act shall continue in full
6 force and effect.

A. PROJECT ON PUBLIC RECORDS CONCERNING LAND

This bill was apparently filed in late 1978 in connection with a federal demonstration project grant administered by the Department of Housing and Urban Development (HUD). The project grant was approved, and the "Land Title Registration Demonstration Project H2993RG" has been carried on during 1979 at the Middlesex County (South District) Registry of Deeds at Cambridge with the cooperation of John F. Zamparelli, Register of Deeds.

This project has produced a number of useful suggestions for improvements in land records.

The demonstration project was authorized under Title 12 U.S.C. §2611, and it would appear that the HUD program revolves around the parcel indexing concept.

Much current enthusiasm for this federally inspired program comes from the many implications of the Real Estate Settlement Procedures Act (RESPA) of 1974.

The major impact of this RESPA statute was the "Disclosure Statement" now in common use, by which all the details of settlement on a house purchase were disclosed in writing to the consumer at the time the mortgage loan was written.

1. RESPA Section 13-History

Section 13 of the Real Estate Settlement Procedures Act, now Title 12 U.S.C. Section 2611, provides:

§2611. Land parcel recordation system; establishment on demonstration basis

The Secretary shall establish and place in operation on a demonstration basis, in representative political subdivision (selected by him) in various areas of the United States, a model system or systems for the recordation of land title information in a manner and form calculated to facilitate and simplify land transfers and mortgage transactions and reduce the cost thereof, with a view of the possible development (utilizing the information and experience gained under this section) of a nationally uniform system of land parcel recordation.

The legislative history of this section is found in Senate

Report No. 93-866 on REAL ESTATE SETTLEMENT PROCEDURES ACT P.L. 93-522 which said in part:

**ESTABLISHMENT ON DEMONSTRATION BASIS OF
LAND PARCEL RECORDATION SYSTEM**

Section 9 now Title 12 Sec. 2611 would direct the Secretary of HUD to establish, on a demonstration basis, model land recordation systems in various parts of the country in the hope of effecting fundamental improvements in the present systems utilized by local governments for the recordation and indexing of land title information. Virtually all of the witnesses in the recent Senate hearings on closing and settlement costs testified as to the urgent need for the Federal Government to take meaningful steps in this area to assist local governments in improving and modernizing their land record systems. The January, 1972, Report by American University to HUD on "The Real Estate Settlement Process and Its Costs" concluded that "the root problem involved in reducing costs is reform and reorganization of public land records." Section 9 is designed to meet this problem by having HUD establish on a demonstration basis in various areas, recordation systems that can be used as a model by local governments who wish to modernize their own antiquated systems. The experience gained from these models should prove invaluable in the determination of how basic reforms in land parcel indexing and recording can be achieved.

It is impossible to prescribe a land recording system which would apply to all of the fifty states. The surveying methods by which Kansas and Nebraska were divided into sections and quarter sections, and the Spanish and French influences in the territory formerly held by those nations have created a system of land records significantly different from those of "Puritan" Massachusetts Bay and Plymouth Colonies, now the Commonwealth of Massachusetts.

In theory, the whole world could be mapped, in small parcels, by satellite cameras. But in practice, this concept is not just around the corner.

We must deal with the realities of our existing system, the potential for improvement, and the application of common sense in the area of budgetary requirements. While HUD may fund demonstration projects, the Massachusetts taxpayer must ultimately pay the true costs of "basic reforms" of all descriptions.

2. Expense and Risk in Purchase of Real Estate

During the period of the demonstration project at Middlesex County, and even prior thereto, concern was expressed that settlement costs in connection with real estate purchases were higher than they might be. Studies made in other sections of the nation make it apparent that settlement costs in Massachusetts are lower than in comparable areas.

In 1979, Chapter 531 was enacted for the purpose of requiring the attorney representing a mortgagee bank to certify to the buyer, at no additional charge, that the buyer had acquired a *good and clear record and marketable title*.

Buyers are also requesting title insurance for their protection, although in some areas, such as Worcester County, this practice has been long followed.

Buyers who are well advised will secure a site survey, a building inspection, a termite inspection, a certificate as to municipal liens, a sewage disposal report and an insurance appraisal.

Although all of these safeguards lessen the risk, they also increase the cost.

There is a rather simplistic idea that the expense of settlement can be reduced by the adoption of various elementary procedures which will guarantee good title at minimum cost. We believe that there is always a chance to reduce consumer costs, but one must consider the risks in so doing.

By the consistent and manifest desire of the consumer, and because of the consumer protection statutes and proclivity of some to file malpractice claims against title attorneys, it is becoming apparent that title examiners and attorneys must exercise more care than ever before in connection with title work. This development is socially useful, but like other such developments, there is an increased cost. The modern trend of almost absolute landlord liability, for example, has increased insurance costs and elevated rents, albeit it is socially useful.

We cannot promise to reduce risks and at the same time reduce costs for those services which lessen the risks.

We are making several concrete legislative proposals in this report for the purpose of cost reduction and further protection of the real estate investments of our citizens. None of our suggestions will require the expenditure of any public funds other

than some minor incidental expense, but the public should benefit greatly.

3. Scope of the Proposal

The objective of this specific bill and of the many related bills filed both in the 1979 and 1980 sessions of the General Court, is to make a beginning in a program to give more ready accessibility to records pertaining to land.

We now commence research in many land records by means of the past or present owner's name. When a deed is given, the seller's name is entered in a grantor index and the name of the buyer is entered in the grantee index.

These indexes have been maintained year by year since 1620. From time to time, consolidated indexes have been made, some covering many generations, others only a decade.

It would be naive to suppose that skilled persons are forced to rely entirely on the grantor index in examining titles. Various sets of plans, assessors maps, atlases, volumes of plans, and extensive Land Court records and plans assembled since 1899 provide the experienced title person, surveyor and other interested parties with access to desired information. To the inexperienced, however, it must appear unduly complicated and there is, in fact, considerable duplication of work for which the public must pay.

The modern automated grantor/grantee indexing systems in the registries of deeds have been enhanced by computer assisted functions which produce periodic consolidations of the current indexes which, in turn, expedite the efficient use of the records.

Massachusetts has had a limited experience with tract indexing. G.L. Chapter 184, §33, enacted in 1969, permitted cities and towns to file a "public restriction tract index" on which conservation and preservation restrictions and other public restrictions could be listed with reference to appropriate maps. It proved difficult to adopt suitable regulations under section 33.

The key to the Public Restriction Tract Index was a well prepared and maintained set of maps. The idea has not been overwhelmingly successful, and there seems to be little enthusiasm for it.

A high quality set of maps, maintained currently, is also the

key to the present proposals for multi-purpose maps and parcel identification numbers.

4. Parcel Indexing for Governmental and Administrative Purposes

This is a program for the production and maintenance of a system of multi-purpose maps, prepared at the municipal level, and based on the parcel indexing system, for future use in conjunction with assessing, zoning, coastal, wetland and critical area control, various land use controls, drainage, sewage, public works, traffic, and a myriad of other concerns of state, county and municipal governing bodies.

The communities of Cambridge, Lexington, Needham, Newton, and Springfield have already expressed interest in cooperating in a system of multi-purpose maps, copies of which would be maintained at the County Registries of Deeds.

Parcel indexing, as explained hereafter, is the core of this system of multi-purpose maps.

Parcel Identification

Presently, there is little or no coordination among the various local and state agencies maintaining land related records: title records, probate records, Land Court records, tax assessor's records, zoning and environmental restrictions, and engineering records are all maintained in separate locations throughout the Commonwealth. Furthermore, there is no uniform system of indexing on the basis of individual parcels. All of this is very inefficient and causes loss of time and great expense to both the users of the records, who must travel from one agency to another in order to obtain all the necessary information, and to the public, which bears the cost of separately maintained, and frequently overlapping records.

The first phase in developing a more comprehensive land data system in which access to information, including title records, information concerning soil conditions, zoning and environmental restrictions, tax records, geographic location, and present land use, is available quickly and accurately is to

assign unique parcel identifiers to each unit of property within the state. Although a few commentators have taken the position that the identifier should contain a precise legal description of the parcel, the majority of experts in this area agree that it is sufficient that the identifier simply identify the property and leave the legal description to traditional means. But this is not to say that the parcel identifiers could not be used as an additional shorthand reference to the property in deeds or other instruments, along with the full legal description, or reference to it.

Although there are numerous variations within each, there are basically two types of parcel identifiers. The hierarchical system assigns a number for each unit and subunit within a chain of geographic units. For example, a system might assign a number for the state, county, town and block in which the parcel lies and number the parcel within the block. This system of identifiers indicates nothing about the parcel other than its location in a general way. The other type of system, a coordinate system, assigns a number to the parcel according to its geographic location, enabling the identifier to serve two purposes. An example of this type of identifier is the State Plane Coordinates System which divides each state into a series of zones and imposes a grid over each zone. Because the exact location of each zone is tied into a nationwide system of triangulation and monumentation developed and maintained by the National Geodetic Survey, it is possible to accurately describe the location of any parcel in the country by reference to the coordinates it occupies on the State Plane Coordinate System.

In 1975, acting upon a report prepared for it by Dr. Harmut Ziemann of Ottawa, Canada, the Massachusetts Land Records Commission adopted a resolution which recommended the implementation of a system of parcel identifiers built upon a hierarchical scheme. The Commission's suggested configuration consisted of three digits designating the Town, three digits designating the Parcel Group, which is a subdivision of the Town having permanent boundaries, four digits designating the Source Parcel, which would be each parcel as it existed at the time the identifiers were assigned, a possible four digits constituting a Suffix to reflect any changes in the Source Parcels, and a one digit check digit, used to verify the accuracy

of the indexing. The identifier for any particular parcel would look like this:

XXX	XXX	XXXX	XXXX	X
Town	Parcel Group	Source Parcel	Suffix For	Check Digit
Designation	Designation	Designation	Changed Parcel	

Additionally, the Commission called for the inclusion of the grid coordinates of the visual center of the parcel among the stored data and the preparation of large scale property maps and definition of a grid coordinate system. These last proposals were made with the view that a coordinate system may, upon completion of the pilot project, turn out to be the better of the two systems.

In 1976, in *Proposed Guidelines for the Assignment of Parcel Index Numbers and Parcel Location Numbers*, the Land Records Commission added one more digit to the proposed parcel identifier. This would be placed immediately before the Check Digit and would indicate certain conditions, such as whether the land is registered, whether the land is subject to condominium ownership, and some third condition. By the use of the numerals 1 through 8, every combination of these three conditions could be indicated.

The second phase in developing a modern data system is to enter all existing information and all information generated in the future into a computer, using the parcel identifier as the key to the stored material. The entering of information into the system would be performed in a single centralized location, but a large network of terminals would be dispersed throughout the state at both public and private locations so that the complete data bank would be available anywhere in the state. Using such a computerized system, examiners would simply enter the number of the parcel about which information is sought and the kind of data desired. The material would be displayed on a visual monitor for the examiner's inspection. Printouts of any of the data displayed could then be obtained.

It would seem useful, if economically feasible, to have the Executive Office of Communities and Development establish a program to produce and maintain a uniform system of multi-purpose parcel index maps.

Such a program obviously would benefit from any pilot pro-

ject which would test the practicality of the various recommendations.

To the extent that the communities could redirect their new mapping efforts to a parcel identifier system, they might be able to proceed at little additional cost, except for the additional collections of maps which should be furnished to the Registries of Deeds and other agencies of state government.

In those communities where no mapping activity is in evidence, state funds may be needed, unless federal grants are available.

5. Parcel Indexing to Replace Grantor/Grantee Index System

While a system of multi-purpose maps will certainly prove immediately useful in numerous activities of government, at all levels, a sharp distinction must be made with respect to the use of the parcel index maps in connection with the conveyance of title to real property. A system of parcel indexing is now maintained at the Nassau County Registry of Deeds in Mineola, Long Island, New York.

When a deed is prepared in this county, the usual land description is included, but in addition, there is a marginal notation such as: "Section 27, Block 99, Lot 99." This designation simply means that the property is in Oyster Bay and is shown on an Index Map for Section 27, Block 99 as Lot 99. The measurements of the various lots are shown on the block plans.

For the period 1929-1947, notice of transactions concerning particular properties was entered in index books arranged by parcel number. Copies of the actual instruments were and are stored in other books. Since 1947, however, the county has maintained a system of index cards consisting of the "Master Property Card," "Map Card," and the "Unit Property Card." Notice of instruments affecting all or a large part of the Block is shown on the Master Card. Instruments affecting only the particular lot are shown on the Unit Card. Finally, notice of utility easements and road layouts concerning the Block is entered on the Map Card.

A separate grantor/grantee index is also maintained, but as there is a title standard in Nassau County of searching a chain of title back for only forty years, the examination can be com-

pleted by the use of the parcel index system unless some complication is noted.

There are many systems of land record systems in use throughout the United States. As with the second law of thermodynamics, a system, once in motion, tends to remain in motion and moves along its traditional lines.

Massachusetts need not offer any apologies for its land records.

If a new parcel identifier system were to be installed in Massachusetts in 1980, there could be no reliance on the system until at least the year 2020 because prudence dictates that, even assuming a reliable system, a forty year title search would seem to be the minimum in most cases.

The cost of such a system is its major drawback, as the expense involved in accurately converting past records to computer readable form is likely to be prohibitive. It would be possible to develop the computer based system prospectively, but such a plan would not yield its real benefits for more than half a century. We have not dealt with total computerization in this report.

Only when the computerized system is feasible will a multi-purpose integrated land record system become a reality. In the meantime, however, it would be possible to make lesser, but still substantial, strides towards modernizing the present system.

In the case of land title records, the use of parcel identifiers and microfilm or microfiche would eventually reduce the time required for a title search. Presently, all documents presented for recording in the registries are copied and bound in large record books. In the registries, entire floors are devoted to the storage of these books. To facilitate the process of searching these records, a Grantor Index and a Grantee Index are maintained chronologically and provide the title examiner with the book and page number where instruments involving the named individual can be found. There is a brief description of the property noted beside each index entry so that the examiner will not have to inspect every document involving the particular person.

Title Examinations

A title examination under the present system involves three

basic steps. First, the examiner must construct a "chain of title." A seller ordinarily provides the book and page reference of the deed by which he claims title. This deed will often contain a statement by the grantor that the grantor's title is evidenced by a particular deed to him and should provide the book and page where such deed may be located. Usually, the forty year chain of title can be formed in this way. If any deed in the chain lacks such a title reference, the examiner may have to search the name of a grantor through the Grantee Index to find the deed into that grantor. The examiner may continue back until a chain of at least forty years is completed and a reliable title source is established.

The second step in this process is to run down the name of each owner in the chain of title in the Grantor Indexes to locate the book and page reference of any interests an owner may have created in the property voluntarily or otherwise. One might expect that the examiner could limit this search of the indexes to the period that each owner actually had an interest in the property — that is, the time between the conveyance into and the conveyance from the particular owner. But, because Massachusetts adheres to the doctrine of estoppel by deed, purchasers could be held to be on notice of, and hence take subject to, any warranty deeds given by a person in the chain of title, even if the deed was given before the grantor actually received title. This doctrine theoretically makes it necessary for the examiner to search the index for a period of years prior to the time each person took title. Furthermore, the filing of bankruptcy can affect prior transfers of property and the filing of tax liens can do likewise. Because of this, the examiner continues to run the name of each owner in the indexes for a term after the conveyance by that person.

A title search may be further complicated by the fact that in Massachusetts a purchaser may take property subject to rights and restrictions not mentioned in his deed. This could occur, for example, when a person who owns a tract of land subdivides the property and sells smaller parcels to individuals. If the grantor imposes restrictions in the early deeds and states that these will burden the remaining land of the grantor, subsequent purchasers from the grantor may be bound by such restrictions, notwithstanding that the purchaser may have had no knowledge of the restrictions which were not mentioned in his

deed. This doctrine in effect requires that an examiner inspect the early deeds of any development in the chain of title.

The third step in the process of title examination is to assemble an abstract of all the documents garnered from the Grantor Index and to examine them to insure that the seller owns the interest that is claimed and that there are no serious problems with the title. On this title evidence a legal opinion is formed.

6. Effect of Parcel Identifiers

If a system of parcel identification is adopted, every document presented for recording would have noted in the margin a reference to the parcel affected by the instrument. A note would then be entered on a parcel index record card indicating the book and page reference or location in the microfilm files where the document was located. Thus, the first two phases of title examination outlined above might be consolidated in the future by the adoption of parcel indexing. The existing system would be used for many years to come, however.

The need for a parcel index itself could be minimized by the use of microfiche. Microfilm is a roll of film and requires that documents be photographed and stored in the order in which they are presented for recording, thus necessitating an index. Microfiche, on the other hand, is the equivalent of a "snapshot" of a single document. The initial reproduction is made on large sheets containing many images, but these sheets may be cut up so that each piece contains only one image. By maintaining a separate jacket or folder for each parcel, and placing a microfiche copy of every document affecting the parcel in the jacket, the system, in theory, does away with the need for an index. The examiner simply requests the jacket for the parcel in which he is interested, and examines the documents. Obviously, the microfiche system would require a complete backup for title integrity.

Whether a system based upon a parcel identifier is coupled with the maintenance of bound volumes or with film, substantial savings of time over the present system would result from not having to deal regularly with the Grantor Index. It is doubtful that the microfilming system is any quicker for a title examiner than the present system, but its advantages in terms

of space saving are obvious. While the microfiche system is clearly much easier for the examiner, the maintenance of a separate copy of a document for every parcel which it effects results in additional work and expense.

Any of the above mentioned systems would make it considerably easier for the title examiner to contend with a doctrine of estoppel by warranty deed, and with restrictions imposed by common grantors, bankruptcy and tax liens. Although instruments concerning such things would continue to be out of the chain of title, they would carry identifiers as if they were in the chain of title, and it would thus be unobjectionable to hold purchasers to them.

The coordination of land data not maintained at the registry of deeds can be accomplished by centrally locating the data either through the use of computers or by physically storing the information in one place. The problems of the computerized system have already been alluded to and the idea of maintaining all land data in one place (other than maps) without the use of computers is obviously impractical. It would be possible, however, to improve the efficiency with which non-registry records are compiled and made available through a uniform system of indexing based upon the assignment of parcel identifiers.

We do not discourage the establishment of a tract index in each registry of deeds. A properly prepared set of maps containing a parcel index number for each municipality, section, block and lot would be highly useful.

The cost to produce an appropriate set of maps would seem to be considerable. It could not be expected that such maps would be relied upon for the establishment of title or to establish the boundaries until many decades had passed, if then.

We would doubt that the mere filing of an administratively convenient map, with no survey, could divest title to real estate. There are those who appear to believe that after a convenient period, those who did not come forward to dispute the boundaries shown on the new parcel index maps would be deemed to have concurred in the work.

The last general attack by state government on Massachusetts land titles took place in 1687 when Governor Andros introduced the "Writ of Intrusion" placing all land owners on the basis of tenants at will. To avoid a forfeiture, citizens were

required to reach an understanding with Andros, after which their titles were confirmed. While undoubtedly there were other causes for the 1689 Revolution, this was one of them. The memory lingers.

To suddenly cast doubt on titles, as we have learned in the case of Mashpee, is to invite economic chaos. For this reason, we should not move too drastically or too suddenly away from what have been acceptable title practices and standards.

As an aid to title examination and as a positive step towards a future title recording system based on new principles, the use of parcel identification numbers in conveyancing has a place today and may have a large role in the future.

We certainly cannot proceed on the principle "What has posterity ever done for us?"

We are unable to make any judgment as to whether the parcel indexing system will result in any significant burden on the facilities and resources of the various registries of deeds. This aspect of the proposal must be fully investigated.

An additional recording fee may cover some or all of the cost.

B. PROCEDURAL CHANGES IN RECORDING OF LAND COURT TITLE RECORDS

1. Draft Act on Information Storage Facilities

This proposal would amend G.L. Chapter 185 by adding section 48A to provide that the register of deeds, with permission of the Chief Justice of the Land Court, may use electronic, magnetic or comparable means for storing information. In any registry using such facilities, information required to be indexed or entered in entry books, or any certificates of title, may be entered in lieu thereof in any such storage facilities.

The Act further provides that the register may designate a date after which any printout of such a system shall be admissible as evidence. In the case of certificates of title, the printout shall be conclusive as to all matters contained therein.

Under this proposal, the process of properly indexing documents of title, and causing notations to be made on title certificates, as well as the issuance of certificates of title to owners

could be automated. By the use of word processing equipment, there could be a saving of time and overhead expense.

We recommend the following:

1980 DRAFT ACT

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 185 of the General Laws, as most recently amended by Chapter 478 of the Acts of 1978, is hereby further amended by adding after Section 48 the following section:

Section 48A. Notwithstanding any other provision of this chapter, the register of deeds, as assistant recorder with the permission of the Chief Justice of the Land Court Department of the Trial Court, may use a microphotographic, electronic, mechanical, magnetic or other comparable information storage facility capable of converting information stored and entered therein into legible type or print by mechanical or other means. In any registry of deeds which uses such a facility, any information which is required by this chapter to be indexed or which is required to be entered or noted in an entry book and any certificate of title or memorandum pertaining thereto which is required to be transcribed, entered, registered, noted or made in a registration book, by the assistant recorder, may, in lieu thereof, be indexed, entered, noted, transcribed, registered or made in one or more of such information storage facilities. The assistant recorder may designate a date upon and after which such record of any entry, certificate of title, or memorandum so entered and stored in said facility and verified by him shall be deemed to be the original entry, certificate of title or memorandum, and thereafter any copy or printout thereof, duly certified under the signature of the assistant recorder and sealed with the seal of the court, including an owners' duplicate certificate of title, shall be received as evidence in all courts of the commonwealth, and shall in the case of certificates of title be conclusive as to all matters contained therein, and as to other documents evidence of the contents thereof.

Nothing in this section shall relieve the register of deeds of the requirements imposed by Chapter 36 Section 15 of the General Laws regarding duplicate copies of records.

2. Draft Act on Assessors Maps for Land Court

Modern assessing practice includes the preparation and up-

date of maps showing every parcel of land in the community.

While these maps *cannot* be fully relied upon for purposes of title examination, and in fact have *never* been accepted by conveyancers for that purpose, they are of great assistance, especially to the Land Court, in dealing with registration cases and also with cases involving the foreclosure of tax titles.

Inasmuch as these maps and atlases are being prepared periodically by the various communities, we believe that a statutory requirement that one copy of every new map, plan or atlas be sent to the Land Court, will cast no significant burden on any community and will assist local tax collectors in their foreclosure cases as well as provide valuable information for Land Court use.

We recommend the following:

1980 Draft Act

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 59 of the General Laws, as most recently amended by Chapter 797 of the Acts of 1979, is hereby further amended by inserting after Section 52 the following new section: —

COPIES OF MAPS

Section 52A. The assessors, upon receiving for their general use a newly completed or revised map or maps showing locations of boundaries of real property in the city or town or a sector thereof shall transmit a copy of each such map forthwith to the land court department of the trial court.

C. CHANGES IN CONVEYANCING PRACTICES FOR REGISTERED LAND

The introduction of a parcel identification system should result in no significant changes in the manner in which deeds and other legal instruments are prepared.

Elsewhere in this report, we have indicated various new and different procedures which may come into being.

Obviously, the present grantor and grantee indexes must

continue. A further entry of the parcel identification number must also be made with each recording of a document.

Unless additional new indexes are also to be kept, which make it possible to quickly locate all documents relating to the parcel in question, the mere use of the number alone has no value.

Chapter 185 — Registered Land

It is quite possible that the present identification system, which is employed in connection with land registered under Chapter 185, is capable of use as a parcel identifier with possible geographical prefix locator symbols as needed.

In the case of registered land, both the title and the boundary have been judicially determined. All rights and interests in the land should normally be determinable from the Certificate of Title and its "Encumbrance Sheet." Boundary questions can be determined from the registered plan. No parcel identification scheme can ever do as much for title integrity.

While the land registration process is expensive, it sets standards for all other conveyancing practice. It would not be progressive to debase the value of the registered title nor is it of value to short circuit the judicial process of the Land Court, acting *in rem* on the land itself so that a bargain basement title, possibly fatally defective because of lack of due process from the outset, can be cranked out after hasty and incomplete consideration.

There are, however, a number of improvements in Land Court procedure which can reduce the expense to the citizen who wishes to register title to land, and which can reduce the time delay between the filing of the petition for registration and the entry of the final judgment.

Improvements are needed in the following areas:

1. Land Court Examiners

Chapter 185, §12 now provides, as part of the process of registration of title that *after* the complaint for registration of title has been filed, the court will appoint a previously certified "land court examiner" to prepare an abstract of title and report.

As a general rule, the land court examiner requested by the

person seeking registration will be appointed. The examiner's compensation is paid by the person filing the complaint.

Because of heavy work loads, and for various reasons, the completion of the work of the examiner is sometimes delayed for months or even longer.

By statute, at present, there is some delay then, which could be eliminated if the Land Court Department could require the previously designated "Land Court Examiner" to file his abstract at the outset of the case, along with the plan, and perform other duties assigned by the court for which the petitioner would pay.

2. Notice of Petition

The statute we recommend would place the responsibility on the Land Court, not the petitioner, to file the necessary notice. This change will eliminate vexatious problems of oversight and delay.

3. Regulations for Plans

Although the Land Court has, for many years, published regulations for the preparation of plans, the requirement for compliance with these regulations has never been part of the statute. This should be rectified.

4. Publication of Notice-Registration of Land

Because the registration proceeding is *in rem* and will result in a binding judgment affecting the rights of all as to the parcel to be registered, due process of law requires publication of notice giving sufficient time for any interested party to respond.

If the title abstract is filed *with* the complaint for registration, it will be very beneficial and save much time to proceed with the immediate publication of notice as required by Chapter 185, §38.

5. Draft Act on Land Court Procedures

To accomplish the foregoing objectives, we recommend the following:

1980 DRAFT ACT

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 12 of Chapter 185 of the General Laws
2 is hereby amended by inserting after the first sentence, as ap-
3 pearing in Section 87 of Chapter 478 of the Acts of 1978, the
4 following sentence: —

5 In addition he shall appoint attorneys at law to be known
6 as “land court examiners” who shall be assigned such duties
7 as the court may direct and payment for whose services shall
8 be the responsibility of the petitioner in any matter to which
9 they are assigned.

1 SECTION 2. Section 24 of said Chapter 185 is hereby amended
2 by inserting before the word “examiners,” as appearing in
3 line 2 of the Tercentenary Edition, the words: — Land Court.

1 SECTION 3. Section 27 of said Chapter 185 is hereby amended
2 by striking out, in line 3 as appearing in the Tercentenary Edi-
3 tion, the word “petitioner” and inserting in place thereof the
4 following words: — recorder, at the expense of the petitioner.

1 SECTION 4. Section 33 of said Chapter 185 is hereby amended
2 by striking out the first three sentences, as appearing in the
3 Tercentenary Edition, and inserting in place thereof the fol-
4 lowing sentence: —

5 The petitioner shall file with the complaint a plan of the
6 land drawn in accordance with land court regulations.

1 SECTION 5. Said Chapter 185 is hereby further amended by
2 inserting after Section 33 the following new section: —

3 Section 33A. The petitioner shall file with the complaint a
4 land court examiner’s report of title on such forms as the
5 court may prescribe concluding with a certificate of his opin-
6 ion upon the title. The land court examiner shall be desig-
7 nated by the petitioner from a list of land court examiners
8 maintained by the land court department. Said examiner shall
9 search the records and investigate all facts stated in the com-
10 plaint or otherwise brought to his notice concluding with the
11 above mentioned certificate of his opinion. The report shall
12 be at the expense of the petitioner.

1 SECTION 6. Said Chapter 185 is hereby amended by striking
2 out Section 37 as most recently amended by Section 1 of Chap-
3 ter 151 of the Acts of 1977.

1 SECTION 7. Section 38 of said Chapter 185 is hereby amended
2 by striking out the first sentence as amended by Section 2 of
3 Chapter 151 of the Acts of 1977 and inserting in place thereof
4 the following sentence: —

5 Upon filing, the recorder shall immediately cause notice of
6 the filing of the complaint to be published in a newspaper pub-
7 lished in the district where any part of the land lies.

1 SECTION 8. Said Chapter 185 is hereby further amended by
2 striking out Section 43, as amended by Section 90 of Chapter
3 478 of the Acts of 1978 and inserting in place thereof the fol-
4 lowing section: —

5 Section 43. If in any case, an appearance is entered and
6 answer filed, the case shall be set down for hearing on the
7 motion of either party or at the direction of the court, but a
8 default and order shall first be entered against all persons who
9 do not appear and answer, in the manner provided in the pre-
10 ceding section. The court may refer the case or any part
11 thereof to one of the land court examiners, as master, to hear
12 the parties and their evidence and make report thereof to the
13 court. His report shall have the same effect as that of a
14 master appointed by the superior court in equity, and he shall
15 proceed according to the rules of said court applicable to
16 master, except as the same may be modified by the rules of
17 the land court department. The compensation of a master
18 appointed under this section, shall be awarded by the land
19 court department and shall be paid by the commonwealth,
20 except that compensation may be awarded by the court in its
21 discretion as a part of the taxable costs of the proceedings, in
22 which case the compensation shall be paid as decreed by said
23 land court department.

D. OPPOSITION TO CURRENT PROPOSALS

The Judicial Council recommends that the General Court re-
ject certain proposals currently being put forth in the following
areas:

1. Registration of Land Without Establishment of Boundaries

In a 1978 study by Shick and Plotkin entitled *Torrens in the United States*, the authors had this to say about Massachusetts:

The land court is a well respected institution in Massachusetts. This is clear in opinions expressed in Torrens literature going back to the early part of the century, as well as in opinions of practicing attorneys, law professors, and executives of mortgage lenders and title companies who deal with the court and its work product on a daily basis. Many feel that the unique characteris-

tics of the court-judicial control, state wide jurisdiction, and *attention to boundary accuracy* have contributed to its success while Torrens systems have failed in so many other states. Others point to the leadership of a long line of quality judges.

Equally important, we think, is the fact that underlying needs for title clarification and for *boundary determination* are being met by the registration system. The Massachusetts approach is expensive. However, the incidence of continued registration suggests that land owners with specific needs perceive that the expense is worth while. Based upon the opportunity to compare other jurisdictions, we must agree. (Emphasis supplied.)

When it is urged that titles should be “guaranteed” without a judicial boundary determination, we cannot agree.

Title insurance is not the equivalent of title registration under Chapter 185, and except for obvious boundary situations, many title insurance policies exclude matters which a full survey would disclose. Title insurance is concerned with underwriting various risks which are diffused through many policy holders. Title registration is concerned with a judicial determination (*in rem*) of ownership and boundaries.

Only in the limited category of condominium projects where the plans have been made in accordance with the Land Court standards, or equivalent, are we prepared to depart from the stringent requirements for boundary determinations in land registration.

We also point out that surveying practices and technical improvements must be considered when existing recorded plans are relied upon for boundary lines. It is by no means uncommon to find that existing recorded plans are grossly inaccurate or even to suppose that in not a few cases, designedly so.

A procedure does exist under G.L. Chapter 240, in which certain title problems can be adjudicated in the Trial Court Department without the preparation of a new survey. Such proceedings can settle *in personam* disputes or may even result in a judgment *in rem* acting on the land itself. A judgment in such cases would be a matter of record.

We do not support any effort to dilute the excellence of the judgments of the Land Court or its deserved reputation for excellence and leadership in the field of title integrity.

2. Pre-Registration of Title

We do not believe that it is in the interest of the public to

provide a provisional registration procedure in the Land Court.

There should not be assorted varieties of land registration; one either has an *in rem* judgment as to ownership and boundaries or one does not. The Torrens system of land registration is not designed to say “maybe.”

E. CONVEYANCING LEGISLATION RECOMMENDED

1. Draft Act on Registration of Title to Condominiums

Since the advent of the condominium concept which allows the purchase of the dwelling unit by the individual, subject to the management of the common areas by a small committee of residents, there has been a great demand for a procedure, reasonable in cost, which would allow a unit purchaser to acquire title at minimum risk and within a reasonable time.

The Land Court has already met this demand by determining the ownership and perimeter boundaries of condominium projects, and issuing a certificate of original registration for the whole project.

As each condominium unit is sold, the buyer need only consult the Land Court certificate and record of encumbrances. A complete examination of title is rendered unnecessary.

The alternative to this process is title insurance on the unit title. Since title insurance must be re-purchased on every sale or mortgage, the alternative of registration in the Land Court is more and more appealing both for marketing purposes and as a means of lessening the risk of some title defect which would prevent re-sale.

Condominium Plans

For many condominium projects, a complete land survey, as well as a detailed set of plans showing the project “as built,” is prepared.

Many of these surveys meet the standards laid down for the preparation of Land Court plans required in connection with petitions for registration of title.

Although we do not accept the idea that plans currently on file are appropriate for use in land registration cases in general, we do believe that in many (but certainly not all) condominium

projects the plan prepared for the project *may* be acceptable to the Land Court and no new plan need be prepared.

If the court is not satisfied with the existing plan, and it cannot be made acceptable, an entirely new plan should be prepared as in other cases.

Therefore, to meet the public demand, and because experience with condominium projects has already demonstrated that in many cases a new survey plan is not required, we recommend the following draft legislation.

According to the provisions of the draft legislation, the petition for condominium registration may be filed by the owner of real estate or the organization of unit owners if the organization is authorized according to the same procedures as those by which the by-laws of the organization may be amended. The master deed and by-laws need not specifically provide the organization such authority.

The petitioner must include with his petition a master deed description based upon a plan which is acceptable to the court and which depicts the land and the location of the buildings thereon. If the petitioner proposes that additional units will be built, and the undivided interest of unit owners changed, the plan must clearly indicate and label the changes to be made.

The petitioner must also submit floor plans which meet the requirements of G.L. Chapter 183A, §8(f).

The petitioner must also include a report of the land court examiner including a certificate of his opinion of title.

After the filing of the petition, the court shall give notice to any person appearing to have an interest in the proceedings. Upon opportunity for or completion of the hearings, the court may issue a decree of registration. No decree, however, can become effective until a condominium has been formed pursuant to Chapter 183A. The court may provide for a separate memorandum of unit ownership for each unit. Upon recording in the southern middlesex registry of deeds of a notice of disposition, the owner shall hold title subject to any preexisting interests as of the effective date of the decree except as otherwise provided by the decree, but free from all encumbrances other than specified in the decree and §46 (federal or state liens which need not be recorded; two years of taxes; streets; leases for less than seven years; betterments; U.S. tax liens). In no event, however, shall such a decree of registration cut-off or extinguish any title to land confirmed and registered pursuant

to Chapter 185, whether prior or subsequent to such decree of condominium registration.

1980 DRAFT ACT

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. *Condominium Registration.* Except as otherwise provided in this section, petitions for condominium registration and all proceedings thereunder, shall be governed by the provisions of Chapter 185 of the General Laws applicable to petitions and proceedings for the confirmation and registration of title to land. A petition for condominium registration may be filed by the owner of real estate or by an organization of unit owners established pursuant to Chapter 183A of the General Laws on behalf of all unit owners, if authorized in the same manner as the by-laws of the organization may be amended, whether or not the master deed or by-laws specifically provide such authority. The petitioner shall include with his petition a master deed description based upon a plan of the land which is acceptable to the court.

The location of building or buildings comprising the condominium or proposed condominium shall be shown on the plan as accepted by the court. If the petitioner indicates that additional units are to be built, and the undivided interest of the unit owners will thereupon change, the proposed phased areas shall be shown and clearly labelled on the plan. The petitioner shall submit floor plans meeting the requirements of Section 8(f) of Chapter 183A of the General Laws. The petitioner shall also include with the petition a land court examiner's report of title on such form as the court may prescribe concluding with a certificate of his opinion upon the title. Following the filing of the petition, the recorder shall order that notice be given to any person or persons who appear on the basis of the petition to have an interest in or a claim to the land included in the petition, abutters to the land as set forth in the petition, and such other notice as the recorder may determine necessary. If, after notice and opportunity for hearing, or after hearing, the court finds that the petitioner has title proper for condominium registration, a decree of condominium registration shall be entered; provided, however, that the court shall not be bound by the report of the examiner of title or other evidence of title filed with the petition, but may require other or further proof of title to be filed, including any evidence of title subsequent to the filing of the master deed, prior to entering the decree of condominium

registration. No decree of condominium registration shall become effective until the condominium has been formed pursuant to Chapter 183A of the General Laws. The court may, by rule, procedure or direction, provide for a separate memorandum of unit ownership for each unit in the condominium.

Upon recording in the southern middlesex registry of deeds of notice of disposition issued pursuant to a petition of condominium registration, the owner, as determined by the decree of condominium registration, shall hold the title subject to any preexisting interests as of the effective date of the decree unless the decree states to the contrary, but free from all other encumbrances except those set forth or referred to in the decree and those specified in Section 46; provided, however, that no title to land or estate or right therein, in derogation of the title to land confirmed and registered with boundary determination pursuant to the provisions of Chapter 185 of the General Laws, whether prior or subsequent thereto, shall be cut off or extinguished by a decree of condominium registration issued pursuant to the provisions of this section.

2. Draft Act on Amendments to Master Deeds-Percentages

There have been many legislative proposals for amendment to Chapter 183A, the Massachusetts condominium law. A number of these are consumer protection oriented and will no doubt become of more concern to the General Court as time goes on and more people acquire condominium units.

We do not treat the consumer protection issue in this report.

However, we believe that there is sufficient judicial experience with condominiums to cause us to make a recommendation with regard to some special problems commonly encountered in the management of a condominium project for the benefit of the majority of the unit owners.

Section 5(b) of Chapter 183A now reads:

(b) The percentage of the undivided interest of each unit owner in the common areas and facilities as expressed in the master deed shall not be altered without the consent of *all unit owners*, expressed in an amended master deed duly recorded. The percentage of the undivided interest in the common areas and facilities shall not be separated from the unit to which it appertains, and shall be deemed to be conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the conveyance or other instrument. (Emphasis supplied.)

There are instances where one unit owner, or a small number

of unit owners, can defeat a proposal which is beneficial to the overwhelming majority by a single negative voice. However inequitable this may be, the court is powerless to grant the necessary relief.

We recommend that the court be given authority to deal with such situations by adding to Section 5(b) the following language:

provided, however, that where economic necessity, supervening impossibility, legal physical or otherwise, mistake, fraud or any unforeseen irremediable event require in justice or in equity the reformation of a master deed a unit owner or owners may bring a civil action assented to by not less than 75 percent of the unit owners sounding in equity in the land court department of the trial court. Upon the commencement of such proceeding the land court department shall require notice by registered mail or otherwise, to all unit owners who are not plaintiffs and have not assented to its filing and such other parties in interest of record as it may require, and shall after hearing grant such relief as is meet and just.

Since more than a two-thirds majority must approve, even under the proposed amendment, we believe the rights of the minority will be protected by the court.

We recommend the following:

1980 DRAFT ACT

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 5 of Chapter 183A of the General Laws is hereby
2 amended by striking out paragraph (b) thereof and inserting
3 in place thereof the following new paragraph (b): —

4 (b) The percentage of the undivided interest of each unit
5 owner in the common areas and facilities as expressed in the
6 master deed shall not be altered without the consent of all
7 unit owners, expressed in an amended master deed duly re-
8 corded; provided, however, that where economic necessity,
9 supervening impossibility, legal physical or otherwise, mistake,
10 fraud or any unforeseen irremediable event require in justice
11 or in equity the reformation of a master deed a unit owner or
12 owners may bring a civil action assented to by not less than
13 75 percent of the unit owners sounding in equity in land

14 court department of the trial court. Upon the commencement
15 of such proceeding the land court department shall require
16 notice by registered mail or otherwise, to all unit owners who
17 are not plaintiffs and have not assented to its filing and such
18 other parties in interest of record as it may require, and shall
19 after hearing grant such relief as is meet and just.

3. Draft Act on Withdrawal of Public Land from Registration

Chapter 185, §52 provides that registration of land constitutes a contract, running with the land, that the land will be forever registered. It then provides that if a parcel of registered land is acquired by a public entity, such acquisition shall be sufficient grounds for withdrawal of the land from the system and the land *shall* be so withdrawn upon petition by the public entity which acquired the land.

We do not believe that a public entity should be forced to withdraw land from the registered land system, and it would appear that some officials believe that Section 52 requires the “deregistration” of land.

Because it is useful for the Commonwealth and its political subdivisions to retain registered titles so that the public can more easily determine the extent of ownership, boundaries, and appurtenant rights, we recommend the following:

1980 DRAFT ACT

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 52 of Chapter 185 as amended by Chapter 445 of the Acts of 1978 is hereby amended by striking the word “shall” wherever it appears and substituting the word “may” therefor.

F. LAND RECORDS ADVISORY COMMITTEE

There have been proposals for an advisory committee to be

established in the Executive Office of Administration and Finance.

To the extent that this committee would be concerned with the operation of the Land Court Department of the Trial Court, and with matters which are traditionally the subject of the expertise of members of the bar who specialize in conveying, we think that there should be a separation of functions along traditional constitutional lines.

The Executive Office of Administration and Finance can and should correlate the plans for a system of multi-purpose maps to be prepared at the municipal level, to be used for varied administration purposes, and to be filed and maintained at the registries of deeds.

A like committee acting under the auspices of the Land Court Department can better assess the development of the program and make necessary recommendations for title integrity and marketability. The Land Court committee can better convey those suggestions which deal with the judicial aspects of land records.

The Land Court committee would be much better able to make an appraisal of the frequency of various title defects and recommend means to deal more adequately with such matters.

G. TECHNICAL IMPROVEMENTS IN LAND COURT ADMINISTRATION

1. Draft Act on Transfer of Cases Between Trial Court Departments

The Land Court Department is a "specialized" court. For example, it has limited jurisdiction, all as set forth in Chapter 185, §15.

If a case, not otherwise within the Land Court Department jurisdiction, does not involve "any right, title or interest in land" the Court may be required to dismiss the complaint.

The Probate and Family Court Department is also a "specialized" court and jurisdictional problems may arise.

In all events, it is now of great importance to the citizen that his case not be dismissed on some technical jurisdictional ground, but rather that it be *transferred* to the appropriate tribunal.

It makes no sense to have a system where a judge can be

transferred from one department to another while the complaints on file cannot receive like treatment where the interests of justice and a practical handling of the case requires.

We recommend the following:

1980 DRAFT ACT

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 6 of Chapter 215 of the General Laws as amended is hereby amended by adding the following sentence at the end thereof:

The Probate and Family Court may upon application of either party or on its own motion transfer to the Land Court Department any civil action in which any right, title or interest in land is involved.

SECTION 2. Section 15 of Chapter 185 is hereby amended by striking the last paragraph thereof and inserting in place thereof the following:

The Land Court may, upon application of either party or upon its own motion, transfer to the Superior Court Department or Probate and Family Court Department any civil action which is not set forth in section one as being within the exclusive original jurisdiction of the Land Court.

2. Draft Act on Conformity of Land Court Rules to Massachusetts Rules of Civil Procedure

The Supreme Judicial Court entered an order under which the Massachusetts Rules of Civil Procedure apply to the Land Court Department of the Trial Court beginning on January 1, 1980. As is the case with the promulgation of significant rules by the judicial branch of government, it was necessary to obtain the endorsement of this change by the legislative department and the approbation of the Governor.

Although the required legislation makes few, if any, substantive changes² in the existing Land Court statute, Chapter 185, it is necessary for the General Court to concur before the

² There is a change in section 52 which we discussed elsewhere in this report.

Massachusetts Rules of Civil Procedure can be extended to the Land Court.

We recommend the following:

1980 DRAFT ACT

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 1 of Chapter 185 of the General Laws, as most re-
2 cently amended by Section 81 of Chapter 478 of the Acts of
3 1978 is hereby amended by striking out the title, the first
4 paragraph and paragraph (a) and inserting in place thereof
5 the following:

6 *Section 1.* The land court department established under
7 Section one of Chapter two hundred and eleven B shall be a
8 court of record, and whenever the words "land court", or
9 wherever in this chapter the word "court" is used in that con-
10 text, they shall refer to the land court department of the trial
11 court and the words "judge of the land court" or the word
12 "judge" in context, shall mean an associate justice of the trial
13 court appointed to the land court department. The land court
14 department shall have exclusive original jurisdiction of the
15 following matters:

16 (a) Complaints for the confirmation and registration and
17 complaints for the confirmation without registration of title
18 to land and easements or rights in land held and possessed
19 in fee simple within the commonwealth, with power to hear
20 and determine all questions arising upon such complaints,
21 and such other questions as may come before it under this
22 chapter, subject to all rights to jury trial and of appeal pro-
23 vided by law. The proceedings upon such complaints shall be
24 proceedings in rem against the land, and the judgments shall
25 operate directly on the land and vest and establish title
26 thereto. A certified copy of the judgment of confirmation and
27 registration shall be filed and registered in the registry dis-
28 trict or districts where the land or any portion thereof lies,
29 as provided in Section forty-eight, and a certificate of title
30 in the form prescribed by law shall be issued pursuant thereto.
31 Immediately upon the entry of a judgment of confirmation
32 without registration, the recorder shall cause a certified copy
33 of the same to be recorded in the registry of deeds for the
34 district or districts where the land or any portion thereof lies,
35 and thereafter the land therein described shall be dealt with
36 as unregistered land.

1 SECTION 2. Said Section 1 of said Chapter 185 is hereby
2 further amended by striking the word "petitions" as it ap-

1 appears in paragraph (e) (f) (g) (h) (i) (j) (j½) and insert-
2 ing in place thereof the word: — complaints.

1 SECTION 3. Section 7 of said Chapter 185, as amended by
2 Section 86 of Chapter 428 of the Acts of 1970, is hereby fur-
3 ther amended by striking in the first sentence the word
4 “petition” and inserting in place thereof the word: — “com-
5 plaint.”

1 SECTION 4. Section 15 of Chapter 185 as last amended by
2 Chapter 417 of the Acts of 1975, is hereby amended by
3 striking out the third sentence thereof and inserting in place
4 thereof the following sentence:

5 “In all other actions the defendant with his answer or a
6 plaintiff within ten days after the time limited by law for
7 filing an appearance and answer, or within ten days after the
8 time allowed by the court for filing an answer, may claim a
9 trial by jury.”

10 and in the eighth sentence by striking the word “decree” as
11 it appears twice in that sentence and inserting in place thereof
12 the word “judgment.”

1 SECTION 6. Section sixteen of Chapter 85, as most re-
2 cently amended by Section 1 of Chapter 506 of the Acts of
3 1910 is hereby amended by striking the word “decree” as it
4 appears throughout said Section and inserting in place thereof
5 the word: judgment.

1 SECTION 7. Section 22 of Chapter 185 as appearing in Sec-
2 tion 2 of Chapter 448 of the Acts of 1904 is hereby amended
3 by striking in the first sentence the word “petitions” and in-
4 serting in place thereof the word: complaints.

1 SECTION 8. Section 23 of Chapter 185, as most recently
2 amended by Section 29 of Chapter 1114 of the Acts of 1973 is
3 hereby amended by striking the words “or decrees.”

1 SECTION 9. Section 26 of Chapter 185, as most recently
2 amended by Section 2, Chapter 423 of the Acts of 1971 is
3 hereby amended by striking the present section and inserting
4 in place thereof the following:

5 Section 26. Complaints for registration of title may be
6 made by the following persons:

7 First. Persons who claim, singly or collectively, to own the
8 legal estate or easements or rights in land held and possessed
9 in fee simple.

10 Second. Persons who claim, singly or collectively, to have
11 the power of appointing or disposing of the legal estate or
12 easements or rights in land held and possessed in fee simple.

13 Third. Infants and other persons under disability, by their
14 legally appointed guardians; but the person in whose behalf
15 the complaint is made shall be named as plaintiff.

16 Fourth. Corporations, by any officer duly authorized by a
17 vote of the directors.

18 One or more tenants for a term of years which is regarded
19 as a fee simple in Section one of Chapter one hundred and
20 eighty-six, shall not bring an action except jointly with those
21 who claim the reversionary interest which makes up the fee
22 simple at common law; nor shall a mortgagor, except as here-

inafter provided, bring an action without the written consent of the mortgagee; nor shall one or more tenants bring an action who claim undivided shares less than a fee simple in the whole land described in the complaint for registration. If the holder of a mortgage does not consent to the complaint, it may be entered nevertheless, and the title registered, subject to the mortgage, which may be dealt with or foreclosed as if the land subject to it has not been registered. The judgment of registration in such case shall describe the mortgage, and shall state that it has not been registered and that registration is made subject to it, and shall provide that no subsequent certificate shall be issued and no further papers registered relative to such land after a foreclosure of such mortgage.

SECTION 10. Section 26A of Chapter 185, as appearing in Section 2 of Chapter 457 of the Acts of 1931 is hereby amended by striking the section and inserting in place thereof the following: —

Section 26A. Complaints for the confirmation of title without registration may be made by the following persons:

First. Persons who claim, singly or collectively, to own a legal estate or easement or right in land held and possessed in fee simple.

Second. Persons who claim, singly or collectively, to have the power of appointment or disposing of a legal estate or easement or right in land held and possessed in fee simple.

Third. Infants and other persons under disability, by their legally appointed guardians; but the person in whose behalf the complaint is made shall be named as plaintiff.

Fourth. Corporations, by any officer duly authorized by a vote of the corporation or its governing board.

SECTION 11. Section 28 of Chapter 185, as most recently amended by Section 3 of Chapter 423 of the Acts of 1971, is hereby amended by striking the section and inserting in place thereof the following:

Section 28. The complaint shall be in writing, signed and sworn to by each plaintiff or by a person duly authorized in his behalf. It shall contain, a description of the land. It shall also state the name in full and the address of the plaintiff, and the names and addresses of the adjoining owners and occupants, if known; and if not known, it shall state what search has been made to find them.

SECTION 12. Section 29 of Chapter 185, as most recently amended by Section 24 of Chapter 128 of the revised laws of 1902 is hereby amended by striking the section and inserting in place thereof the following:

Section 29. If the complaint describes the land as bounded on a public or private way, it shall state whether or not the plaintiff claims any and what land within the limits of the way and whether the plaintiff desires to have the line of the way determined.

SECTION 13. Section 30 of Chapter 185, as most recently amended by Section 26 of Chapter 128 of the revised laws of

1902 is hereby amended by striking the section and inserting in place thereof the following:

Section 30. If a complaint is made subject to an existing recorded mortgage, the holder of which has consented thereto, or subject to a recorded lease for a term exceeding seven years, or if the registration is to be made subject to such a mortgage or lease executed after the time of the complaint and before the date of the transcription of the judgment, the plaintiff, before a judgment of registration is entered, shall, if required by the court, file a certified copy of such mortgage or lease, and shall cause the original, or, in the discretion of the court, a certified copy thereof, to be presented for registration; and no registration fee shall be charged for registering such original mortgage or lease or such certified copy.

SECTION 14 Section 31 of Chapter 185, as most recently amended by Section 23 of Chapter 128 of the revised laws of 1902 is hereby amended by striking the word "petition" as it appears in this section and inserting in place thereof the word: complaint.

SECTION 15. Section 32 of Chapter 185, as most recently amended by Section 22 of Chapter 128 of the revised laws of 1902 is hereby amended by striking in the first sentence the word "petition" and inserting in place thereof the word: complaint.

SECTION 16. Section 33 of Chapter 185, as most recently amended by Sections 25 and 35 of Chapter 128 of the revised laws of 1902 is hereby amended by striking this section and inserting in place thereof the following:

Section 33. The plaintiff shall file with the complaint a plan of the land, and all original muniments of title within his control. Such original muniments as affect land not included in the complaint may be withdrawn upon filing certified copies thereof. If a complaint is dismissed or discontinued, the plaintiff may, with the consent of the court, withdraw such original muniments of title. The court may, in any case before judgment, require a further survey to be made for the purpose of determining boundaries and may order durable bounds to be set, and referred to in the complaint, by amendment. The expense of survey and bounds shall be taxed in the costs of the case and may be apportioned among the parties as justice may require. If no persons appear to oppose the complaint, such expense shall be borne by the plaintiff.

SECTION 17. Section 34 of Chapter 185, as most recently amended by Section 27 of Chapter 128 of the revised laws of 1902 is hereby amended by striking in the first sentence the word "petition" and inserting in place thereof the word: complaint.

SECTION 18. Section 35 of Chapter 185 as most recently amended by Section 21 of Chapter 128 of the revised laws of 1902 is hereby amended by striking this section and inserting in place thereof the following:

5 *Section 35.* If the plaintiff is not a resident of the common-
6 wealth, he shall file with his complaint a paper appointing an
7 agent residing in the commonwealth, giving his name in full
8 and post office address, and shall therein agree that the service
9 of any legal process in proceedings under or growing out of
10 the complaint shall be of the same legal effect if made on
11 said agent as if made on the plaintiff within the common-
12 wealth. If the agent dies, or removes from the commonwealth,
13 the plaintiff shall forthwith make another appointment; and
14 if he fails so to do, the court may dismiss the complaint.

1 **SECTION 19.** Section 36 of Chapter 185, as most recently
2 amended by Section 28 of Chapter 128 of the revised laws of
3 1902 is hereby amended by striking this section and inserting
4 in place thereof the following:

5 *Section 36.* After the filing of a complaint and before regis-
6 tration, the land therein described may be dealt with, and in-
7 struments relating thereto shall be recorded in the same man-
8 ner, as if no such complaint had been filed; but all instru-
9 ments left for record which relate to such land shall be indexed
10 in the usual manner in the registry indexes and in the index of
11 complaint. As soon as a complaint is disposed of, the recorder
12 shall make a memorandum stating the disposition of the case,
13 and shall send the same to the register of deeds for the
14 proper district or districts, who shall record and index it with
15 the records of deeds and in the index of complaint. If judgment
16 of registration of title is entered the land included in the
17 judgment shall, when the judgment is transcribed as provided
18 in Section forty-eight, become registered land and thereafter
19 no deeds or other instruments which relate solely to such land
20 shall be recorded with the records of deeds, but shall be
21 registered in the registration book and filed and indexed with
22 the records and documents relating to registered land.

1 **SECTION 20.** Section 37 of Chapter 185, as most recently
2 amended by Section 1 of Chapter 151 of the Acts of 1977 is
3 hereby amended by striking the present section and inserting
4 in place thereof the following:

5 *Section 37.* Immediately after the filing of a complaint, the
6 court shall enter an order referring it to one of the examiners
7 of title, who shall search the records and investigate all facts
8 stated in the complaint, or otherwise brought to his notice,
9 and shall file in the case a report thereon, concluding with a
10 certificate of his opinion upon the title. The recorder shall
11 give notice to the plaintiff of the filing of such report.

1 **SECTION 21.** Section 38 of Chapter 185, as most recently
2 amended by Section 2 of Chapter 151 of the Acts of 1977 is
3 hereby amended by striking the present section and inserting
4 in place thereof the following:

5 *Section 38.* Unless the plaintiff withdraws his complaint
6 within fourteen days of the notice of the filing of the
7 examiner's report from the recorder, the recorder shall cause
8 notice of the filing of the complaint to be published in the
9 newspaper published in the district where any part of the land

lies. The notice shall be issued by order of the court, attested by the recorder, and shall be in form substantially as follows:

COMMONWEALTH OF MASSACHUSETTS

Land Court

To (here insert the names of all persons known to have an adverse interest, and the adjoining owners and occupants so far as known), and to all whom it may concern:

Whereas a petition has been presented to said court by (name or names and address) to register and confirm his (or their) title in the following described land (insert description).

If you desire to make any objection or defense to said petition you or your attorney must file a written appearance and an answer under oath setting forth clearly and specifically your objections or defense to each part of said petition, in the office of the recorder of said court in Boston, (designation of location) or in the office of the assistant recorder of said court at the registry of deeds at in the county of where a copy of the plan filed with said petition is deposited, on or before the day of next. Unless an appearance is so filed by or for you, your default will be recorded, the said petition will be taken as confessed and you will be forever barred from contesting said petition or any decree entered thereon.

Witness,, Esquire, judge of said court, this day of in the year of nineteen hundred and

Attest with the seal of said court

Recorder

SECTION 22. Section 39 of Chapter 185, as most recently amended by Section of Chapter of the revised laws of 1902 is hereby amended by striking this section and inserting in place thereof the following: —

Section 39. The return day of said notice shall be not less than twenty nor more than sixty days after the date of issue. The court shall also, within seven days after publication of said notice in a newspaper, cause a copy thereof to be sent by the recorder by mailing a registered letter to every person named therein whose address is known. The court shall also cause a duly attested copy of the notice to be posted in a conspicuous place on each parcel of land included in the complaint, by a sheriff or deputy sheriff, fourteen days at least before the return day thereof and his return shall be conclusive proof of such service. If the plaintiff requests to have the line of a public way determined, the court shall order notice to be given by the recorder, by mailing a registered letter to the mayor of the city or to one of the selectmen of the town or towns where the land lies, or, if the way is a highway, to one of the county commissioners of the county or counties where the land lies. If the land borders on a river, navigable stream or shore, or on an arm of the sea where a river or harbor line has been established, or on a great pond, or if it otherwise appears from the petition or the proceedings that the commonwealth may have a claim adverse to that of the

plaintiff, notice shall be given in the same manner to the attorney general. The court may also cause other or further notice of the complaint to be given. The court shall, so far as it considers it possible, require proof of actual notice to all adjoining owners and to all persons who appear to have any interest in or claim to the land included in the complaint. Notice to such persons by mail shall be by registered letter. The certificate of the recorder that he has served the notice as directed by the court, by publishing or mailing, shall be filed in the case before the return day, and shall be conclusive proof of such service.

SECTION 23. Section 41 of Chapter 185, as most recently amended by Section 33 of Chapter 128 of the revised laws of 1902 is hereby amended by striking in the second sentence the word "petition" and inserting in place thereof the word: complaint.

SECTION 24. Section 42 of Chapter 185, as most recently amended by Section 34 of Chapter 12 of the revised laws of 1902 is hereby amended by striking the present action and inserting in place thereof the following:

Section 42. If no person appears and answers within the time allowed, the court may at once upon motion of the plaintiff, no reason to the contrary appearing, order a general default to be recorded and the complaint to be taken for confessed. By the description in the notice, "to all whom it may concern," all the world are made parties defendant and shall be concluded by the default and order. After such default and order, the court may enter a judgment confirming the title of the plaintiff and ordering registration thereof. The court shall not be bound by the report of the examiner of title, but may require other or further proof.

SECTION 25. Section 44 of Chapter 185, as most recently amended by Section 1 of Chapter of the Acts of 1910 is hereby amended by striking the present section and inserting in place thereof the following:

Section 44. If the court finds that the plaintiff has not title proper for registration, a judgment shall be entered dismissing the complaint, and such judgment may be ordered to be without prejudice, in whole or in part, but unless so ordered it shall bind the parties, their privies, and the land in respect of any issue of fact which has been tried and determined. The plaintiff may withdraw his complaint at any time before final judgment, upon terms fixed by the court. The court may require a plaintiff who moves to withdraw his complaint or to substitute some other person as plaintiff, to stipulate that he shall be bound by the result of any issue of fact which has been tried and determined, and such stipulation shall bind the parties, their privies and the land itself.

SECTION 26. Section 45 of Chapter 185, as most recently amended by Section 3 of Chapter 374 of the Acts of 1923 is hereby amended by striking the present section and inserting in place thereof the following:

Section 45. If the court, after hearing, finds that the plain-

tiff has title proper for registration, a judgment of confirmation and registration shall be entered, which shall bind the land and quiet the title thereto, subject only to the exceptions stated in the following section. It shall be conclusive upon and against all persons, including the commonwealth, whether mentioned by name in the complaint, notice or citation, or included in the general description "to all whom it may concern." Such judgment shall not be opened by reason of the absence, infancy or other disability of any person affected thereby, nor by any proceeding at law or in equity for reversing judgments or decrees; subject, however, to the right of any person deprived of land, or of any estate or interest therein, by a judgment of registration obtained by fraud to file a complaint for review within one year after the entry of the judgment, provided no innocent purchaser for value has acquired an interest. If there is any such purchaser, the judgment of registration shall not be opened but shall remain in full force and effect forever, subject only to the right of appeal as provided by law from time to time. But any person aggrieved by such judgment in any case may pursue his remedy in tort against the plaintiff or against any other person for fraud in procuring the judgment.

SECTION 27. The first paragraph of Section 46 of Chapter 185, as most recently amended by Section 38 of Chapter 128 of the revised laws of 1902 is hereby amended by striking in the first sentence the word "petitioner" and inserting in place thereof the word: "plaintiff."

SECTION 28. Said sentence of said paragraph of said Chapter is further amended by striking the word "decree" and inserting in place thereof the word: judgment.

SECTION 29. Section 47 of Chapter 185, as most recently amended by Section 4 of Chapter 423 of the Acts of 1971 is hereby amended by striking in the first and fourth sentences the word "decree" and inserting in place thereof the word: judgment.

SECTION 30. The first paragraph of Section 48 of Chapter 185, as most recently amended by Chapter 48 of the Acts of 1949 is hereby amended by striking the paragraph and inserting in place thereof the following:

Section 48. Immediately upon the entry of the judgment of registration, the recorder shall send a certified copy thereof, under the seal of the court, to the register of deeds for the district or districts where the land lies, and the register, as assistant recorder, shall transcribe the judgment in a book to be called the registration book, in which a leaf or leaves in consecutive order shall be devoted exclusively to each title, and note therein the day, hour and minute when said judgment is transcribed. The entry made by the assistant recorder in this book in each case shall be the original certificate of title, shall be signed by him and sealed with the seal of the court. All certificates of title shall be numbered consecutively, beginning with number one. The assistant recorder shall in each case make an exact duplicate of the original

certificate, including the seal, but putting on it the words "Owner's duplicate certificate", and deliver it to the owner or to his duly authorized attorney. In case of a variance between the owner's duplicate certificate and the original certificate, the original shall prevail. The certified copy of the decree of registration shall be filed and numbered by the assistant recorder, with a reference noted on it to the place of record of the original certificate of title. If, however, a complaint includes land lying in more than one district, the court shall cause the part lying in each district to be described separately by metes and bounds in the judgment or judgments of registration, the recorder shall send to the assistant recorder for each registry district a copy of the decree containing a description of the land within that district, and the assistant recorder shall register the same and issue an owner's duplicate therefor; and thereafter, for all matters pertaining to registration, the portion in each district shall be treated as a separate parcel of land. Said owner's duplicate certificate, for all the purposes of this chapter, may be produced by photographic process from the original certificate of title, either in whole or in part, and the photographic copy of an assistant recorder's signature on a duplicate certificate so produced shall have the same validity as his written signature.

SECTION 31. Section 49 of Chapter 185, as most recently amended by Section 41 of Chapter 128 of the revised laws of 1902 is hereby amended by striking the word "decree" as appears throughout this section and inserting in place thereof the word: judgment.

SECTION 32. The first sentence of Section 52 of Chapter 185, as most recently amended by Sections 1 and 2 of Chapter 445 of the Acts of 1978 is hereby amended by striking the word "decree" and inserting in place thereof the word: judgment.

SECTION 33. Said first sentence of said Section 52 of said Chapter is hereby further amended by striking the word "petitioner" and inserting in place thereof the word: plaintiff.

SECTION 33A. Said Section 52 is hereby amended by striking in its entirety the second sentence thereof.

SECTION 34. The first sentence of Section 56 of Chapter 185 as most recently amended by Section 48 of Chapter 128 of the revised laws of 1902 is hereby amended by striking said sentence and inserting in place thereof the following:

Section 56. The recorder, under the direction of the court, shall make and keep indexes of all complaints, and of all judgments of registration, and shall also index and classify all papers and instruments filed in his office relating to complaints and to registered titles.

SECTION 35. Section 56A of Chapter 185, as appearing in Section 3 of Chapter 457 of the Acts of 1931 is hereby amend-

ed by striking said section and inserting in place thereof the following:

Section 56A. Complaints for the confirmation of title without registration and all proceedings thereunder shall be governed by the provisions of this chapter applicable to complaints and proceedings for the confirmation and registration of title except as otherwise provided in this chapter. Upon the recording in the registry of deeds for the district where the land, or any portion thereof, lies, of a copy of the decree issued pursuant to such complaint for confirmation of title without registration, the owner of such land, as determined by such decree, shall hold the title thereto free from all encumbrances except those set forth or referred to in said judgment and those specified in section forty-six. Nothing contained in this chapter shall be so construed as to prevent the registration of title to land or easements or rights under the provisions thereof on proceedings commenced either prior or subsequent to a judgment confirming title without registration. Section ninety-nine shall not apply to proceedings for confirmation of title without registration.

SECTION 36. The fourth sentence of Section 62 of Chapter 185 as most recently amended by Section 54 of Chapter 128 of the revised laws of 1902 is hereby amended by striking the word "petition" and inserting in place thereof the word: complaint.

SECTION 37. The first two paragraphs of Section 70, as most recently amended by Section 1 of Chapter 296 of the Acts of 1905 is hereby amended by striking said two paragraphs and inserting in place thereof the following:

Section 70. Mortgages of registered land may be foreclosed like mortgages of unregistered land; but in case of foreclosure by entry and possession, the certificate of entry required by Section two of Chapter two hundred and forty-four shall be filed and registered by an assistant recorder within thirty days after the entry, in lieu of recording. After possession has been obtained by the mortgagee or his assigns, by entry or by action, and has continued for the time required by law to complete the foreclosure, he or his assigns may request that the land court order the entry of a new certificate, and the land court, after notice to all parties in interest, shall have jurisdiction to hear the case, and may order the entry of a new certificate on such terms as equity and justice may require.

In case of foreclosure by action as provided in Chapter two hundred and forty-four, and by exercising the power of sale in the mortgage under the direction of the court as provided therein, a certificate copy of the final judgment confirming the sale may, after the time for appeal therefrom has expired, be filed with the assistant recorder, and the purchaser shall thereupon be entitled to the entry of a new certificate.

SECTION 38. The first sentence of Section 76 of Chapter 185, as most recently amended by Section 68 of Chapter 128 of the revised laws of 1902 is hereby amended by striking

the word "petition" and inserting in place thereof the words: bring an action.

SECTION 39. The first sentence of Section 86 of Chapter 185, as most recently amended by Section 32 of Chapter 1114 of the Acts of 1973 is hereby amended by striking the word "petition" and inserting in place thereof the word: suit.

SECTION 40. The first paragraph of Section 92 of Chapter 185, as most recently amended by Section 43 of Chapter 279 of the Acts of 1917 is hereby amended by striking said paragraph and inserting in place thereof the following:

Section 92. In proceedings for partition of registered land, or for the assignment in fee of registered land claimed by husband or wife by statutory right, after the entry of the final judgment and the acceptance of the report of the commissioners a copy of the judgment and of the return of the commissioners, certified by the register, shall be filed and registered; and thereupon, if the land is set off to the owners in severalty, any owner shall be entitled to have a certificate entered of the share set off to him in severalty, and to receive an owner's duplicate therefor. If the land lies in two or more registry districts, only so much of the judgment or return need be filed and registered in any district as relates to the land in that district. If the land is ordered by the court to be sold, the purchaser or his assigns shall have a certificate entered in pursuance of partition proceedings, whether by setoff or sale, shall contain a reference to the final judgment of partition, and shall be conclusive as to the title to the same extent and against the same persons as such decree is made conclusive by the laws applicable thereto. A person holding such certificate or a transfer thereof may move that the court at any time cancel the memorandum relative to such judgment, and the court, after notice and a hearing, may grant the motion. Such certificate shall thereafter be conclusive in the same manner and to the same extent as other certificates of title.

SECTION 42. The third sentence of Section 112 of Chapter 185, as most recently amended by Section 105 of Chapter 128 of the revised laws of 1902 is hereby amended by striking the word "petition" and inserting in place thereof the word: motion.

SECTION 43. Said sentence of said Section of said Chapter is hereby further amended by striking the word "decree" and inserting in place thereof the word: judgment.

SECTION 44. Section 113 of Chapter 185, as most recently amended by Section 5 of Chapter 272 of the Acts of 1928 is hereby amended by striking said Section and inserting in place thereof the following:

Section 113. If the recorder or any assistant recorder is requested to enter a new certificate in pursuance of an instrument purporting to be executed by the registered owner, or by reason of any instrument or proceedings which divest the title of the registered owner against his consent, and the outstanding owner's duplicate certificate is not presented for

cancellation when such request is made, the recorder or assistant recorder shall not enter a new certificate, but the person claiming to be entitled thereto may apply to motion to the court. The court, after a hearing, may order the registered owner or any person withholding the duplicate certificate to surrender it, and direct the entry of a new certificate upon such surrender. If the person withholding the duplicate certificate is not amenable to the process of the court, or if for any reason the outstanding owner's duplicate certificate cannot be delivered up, the court may by judgment annul it and order a new certificate of title to be entered. Such new certificate and all duplicates thereof shall contain a memorandum of the annulment of the outstanding duplicate.

SECTION 45 Section 114 of Chapter 185, as most recently amended by Section 107 of Chapter 128 of the revised laws of 1902 is hereby amended by striking said section and inserting in place thereof the following:

Section 114. (No erasure, alteration or amendment shall be made upon the registration book after the entry of a certificate of title or of a memorandum thereon and the attestation of the same by the recorder or an assistant recorder, except by order of the court. A registered owner or other person in interest may apply by motion to the court upon the ground that registered interests of any description, whether vested, contingent, expectant or inchoate, have terminated and ceased; or that new interests not appearing upon the certificate have arisen or been created; or that any error or omission was made in entering a certificate or any memorandum thereon, or on any duplicate certificate; or that the name of any person on the certificate has been changed; or that the registered owner has married, or if registered as married, that the marriage has been terminated; or that a corporation which owned registered land and has been dissolved has now conveyed the same within three years after its dissolution; or upon any other reasonable ground; and the court may hear and determine the motion after notice to all parties in interest, and may order the entry of a new certificate, the entry or cancellation of a memorandum upon a certificate, or grant any other relief upon such terms, requiring security if necessary, as it may consider proper; but this section shall not authorize the court to open the original judgment of registration, and nothing shall be done or ordered withholding the duplicate certificate to surrender it, and direct the entry of a new certificate upon such surrender. If the person withholding the duplicate certificate is not amenable to the process of the court, or if for any reason the outstanding owner's duplicate certificate cannot be delivered up, the court may by judgment annul it and order a new certificate of title to be entered. Such new certificate and all duplicates thereof shall contain a memorandum of the annulment of the outstanding duplicate.

V. RIGHTS OF RE-ENTRY AND POSSIBILITIES OF REVERTER HELD BY THE COMMONWEALTH AND THE UNITED STATES

- A. Titles of the Commonwealth
- B. Titles of the United States
- C. Draft Act Recommended

HOUSE . . . (1979) . . . No. 1805

AN ACT TO PROTECT OWNERS WHO ACQUIRE LAND AFTER REASONABLE SEARCH OF DEED RECORDS FROM FORFEITING IT BECAUSE OF RIGHTS OF ENTRY OR POSSIBILITIES OF REVERSER OF WHICH THEY HAVE NO KNOWLEDGE, BY REQUIRING RECORDING OF STATEMENTS BY CLAIMANTS OF ENTRY OR REVERTER RIGHTS WHEN ASSESSORS HAVE FAILED TO NAME CORRECT OWNERS, OR WHOSE PRIOR STATEMENTS MAY BE BEYOND REASONABLE SEARCH PERIOD, OR WHO ARE THE COMMONWEALTH OR THE UNITED STATES.

Be it enacted by the Senate and House of Representatives in General Court assembled and by the authority of the same, as follows:

- 1 SECTION 1. Section 31A of chapter 260 of the General Laws
- 2 as most recently amended by sections 1 and 4 of chapter 527 of the
- 3 acts of 1974 is hereby amended by substituting for the three para-
- 4 graphs thereof the following: —
- 5 *Section 31A. Right of entry or possibility of reverter; procedure.*
- 6 No proceeding based upon any right of entry for condition
- 7 broken or possibility of reverter, to which a fee simple or fee simple
- 8 determinable in land is subject, created before the second day of
- 9 January, nineteen hundred and fifty-five, shall be maintained in
- 10 any court after the first day of January, nineteen hundred and
- 11 sixty-four, unless (1) on or before the first day of January, nineteen

hundred and sixty-four, (a) the condition has been broken or the reverter has occurred, and a person or persons having the right of entry or reverter shall have taken possession of the land, and in case of entry made after January first, nineteen hundred and fifty-seven, shall have filed a certificate of entry pursuant to section nineteen of chapter one hundred and eighty-four, or (b) a person or persons having the right of entry, or who would have it if the condition were broken, or who would be entitled if the reverter occurred, or one of them if there is more than one, shall by himself, or by his attorney, agent, guardian, conservator or parent, have filed in the registry of deeds, or in the case of registered land, in the registry of the land court; for the district in which the land is situated, a statement in writing, duly sworn to, describing the land and the nature of the right and the deed or other instrument creating it, and where it may be found if recorded or registered, and, in case of registered land, naming the holder or holders of the outstanding certificate of title and stating the number of the certificate, and, in case of land not registered, naming the person or persons then appearing of record to own the fee subject to such right of possibility, and in case of a municipality maintaining at the registry of deeds a tract index as authorized by sections thirty-one to thirty-three of chapter one hundred eighty-four, or an appropriate parcel index hereafter authorized by general or special law, such information as to parcel identity as may be needed for proper identification, and in case of such statements so filed twenty years have not elapsed without another such statement having been so filed, or (2) the right of entry or reverter is claimed by the commonwealth or the United States and such a statement is so filed before the first day of January nineteen hundred and eighty-four and twenty years have not elapsed without another such statement being so filed unless before then such a statement has been indexed in such a tract or parcel index, or the land subject thereto remains or is in the ownership of the original grantee subject to the right of entry or reverter, or has not been acquired by a successor in title who had no knowledge of the right when acquiring title and no notice thereof from reference thereto in a conveyance or document affecting the title recorded within thirty years prior to the acquisition or from reference thereto in a certificate of title to the land.

Such statements shall be received and recorded or registered upon payment of the fee required by law, and shall be indexed in the grantor index under the person or person so named, and in case of registered land, noted on the certificate of title, and in either case indexed also in any tract or parcel index maintained at the registry. The register and assistant recorder shall also keep a list of such statements until such time as all such statements have been so noted or indexed in such a parcel of tract index.

This section shall apply to all such rights whether or not the owner thereof is a corporation or a charity or a government or governmental subdivision except as otherwise above provided in case of the commonwealth and the United States, or is under any disability or out of the commonwealth, and it shall apply notwithstanding any recitals in deeds or other instruments heretofore or hereafter recorded except to the extent above provided in case of the commonwealth or the United States, unless a statement is filed

66 as above provided. Nothing in this section shall be construed to
67 extend the period of any other applicable statute of limitations or
68 to authorize the bringing of any proceeding to enforce any right
69 which has been or may be barred by lapse of time or for any other
70 reason, or to limit any right of action the commonwealth or the
71 United States may have against any owner making a conveyance
72 without proper reference to a right of entry or reverter.

1 SECTION 2. Any proceeding permitted by section 31A of
2 chapter 260 before its amendment by section one of this act on
3 account of naming an owner or owners as shown by tax assessors'
4 records by not the true owner or owners of record may continue to
5 be maintained until January 1, nineteen hundred and eighty-four,
6 and thereafter if a statement such as described in section 31A as so
7 amended is theretofore filed as there provided until twenty years
8 have elapsed without such filing of another such statement.

1 SECTION 3. The omission from section 31A of chapter 260 of
2 the General Laws as originally enacted of the words "other than the
3 commonwealth" shall not prevent maintenance of a proceeding
4 otherwise maintainable.

A. TITLES OF THE COMMONWEALTH

House No. 1805 is the most recent proposal to free titles to land in Massachusetts from the threat of ancient reversionary interests. According to the common law of real property, an owner of land is free to convey an otherwise absolute interest in his property while retaining the right to reclaim the property if any specified condition is ever violated. The interest conveyed would be called either a fee simple determinable or a fee simple subject to a condition subsequent, and the reversionary interest retained would be either a possibility of reverter or a right of entry, depending upon the precise language used in the conveyance. Because these interests are descendable and are not subject to the rule against perpetuities, it is necessary to trace title as far back as the sovereign in order to be sure that none exist. In the event that any such interests are discovered, a search for the present owners from whom a release could be obtained is obviously costly and often fruitless.

In an effort to free prospective buyers from this expense and to further the marketability of title, the legislature has enacted a series of statutes designed to limit the effect of these claims. Any reversionary interests created after 1954 are limited in duration to a period of thirty years from the date of their creation. See G.L. Chapter 184A, §3. Apparently mindful of potential constitutional problems in depriving people of pre-

existing interests in property without compensation, the legislature enacted that no proceeding based upon a reversionary interest created prior to 1955 could be maintained after 1966 (later changed to 1964) unless prior to that time notice of the interest had been recorded. *See* G.L. Chapter 260, §31A.

The Supreme Judicial Court has held that section 31A may be constitutionally applied to pre-existing interests because it is in the nature of a statute of limitations. *See Brookline v. Carey*, 355 Mass. 724, 727 (1969).

House No. 1805 would amend section 31A in two material respects. First, the bill would extend the recording deadline for the Commonwealth to 1984 and would require that such notice be re-recorded every twenty years, subject to a few specified exceptions. Second, the bill would explicitly make the United States subject to the same requirements as the Commonwealth. Both of these proposals are subject to some doubt.

As originally enacted in 1956, section 31A read in part:

This section shall apply to all such rights [reversions] whether or not the owner thereof is a government or governmental subdivision thereof.

See 1956 Mass. Acts, Ch. 258, §2. This language would seem to include the Commonwealth, especially when it is remembered that when the legislature desired to exempt the Commonwealth from the operation of Chapter 184A, the exception was explicitly stated. *See* 1954 Mass. Acts, Ch. 641, §1.

In 1968, the legislature amended section 31A to specifically exclude the Commonwealth from its terms. *See* 1968 Mass. Acts, Ch. 496. Although the 1968 amendment was silent as to the retrospective application of the act, in 1974 the legislature declared that the 1968 amendment was to be construed as retrospective and that the 1956 act had never been intended to include the Commonwealth.

If section 31A is construed not to have included the Commonwealth within its scope as originally enacted, there would be no problem with House No. 1805 establishing 1984 as the recording deadline for reversionary claims. If, on the other hand, the section is construed as applicable to the Commonwealth, the failure of the Commonwealth to record its interests prior to 1964 presents a problem of retrospectively revitalizing any interests not so recorded.

In Chase Securities Corporation v. Donaldson, 325 U.S. 304

(1945), the Supreme Court, speaking of a state law which shortened the time in which suit could be brought on bonds issued prior to the legislation, stated that:

. . . where lapse of time has not invested a party with title to real or personal property, a state legislature . . . may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar.

Id. at 311-12. The Court went on to say that:

Some rules of law probably could not be changed retrospectively without hardship and oppression. . . . Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitations so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment.

Id. at 315-16.

The position that a state may enact retroactive legislation so long as there is no resulting hardship to the parties was reiterated by the Court in *Bradley v. Richmond School Board*, 416 U.S. 696 (1973). In this case, the Court ruled that a change in the legal interest rate during the course of proceedings could be applied to the parties. Relying on the absence of the need for an exception to prevent "manifest injustice," the Court applied the general rule that a court should apply the law in effect at the time it renders its decision. *Id.* at 716.

In *Porter v. Clerk of the Superior Court*, 368 Mass. 116 (1975), the Supreme Judicial Court noted that in questions of retroactivity it would no longer be bound by the substantive/procedural distinction which it had applied in the past and declared that it would henceforth look to the proceedings to determine whether the stage of the proceedings to which the law applies has passed. *Id.* at 118.

Applying the common thread of these cases to House No. 1805, it would seem that retroactive revival of the reversionary interests of the Commonwealth would be constitutional. One potential problem, however, would be with any individuals who can establish reliance upon section 31A between 1964 and 1968 to a degree that it would be "manifestly unjust" to apply the 1968 amendment and House No. 1805 to them.

B. TITLES OF THE UNITED STATES

1. Proprietary Titles

By way of specific example, the United States gave a deed on May 12, 1972, of about 455 acres, to the Town of Hingham “for public park or public recreation purposes in perpetuity by the Town of Hingham.”

The deed contained the following provision:

6. If at any time the United States of America shall determine that the premises herein conveyed, or any part thereof, are needed for the national defense, all right, title and interest in and to said premises, or part thereof determined to be necessary to such national defense, shall *revert* to and become the property of the United States of America. (Emphasis supplied.)

Under the United States Constitution, Article IV, Section 3, Clause 2:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any claims of or any particular State.

The United States Constitution also provides that “all the Laws of the United States which shall be made in Pursuance thereof” shall be the “Supreme Law of the Land.” Art. VI, Clause 2.

Under this provision, the United States may acquire a proprietary interest in land, much as any individual would, but in addition, is empowered to make any “needful rules and regulations” respecting such property. This power has been construed together with the Supremacy Clause so that in the absence of federal law, state law controls whether enacted prior to or subsequent to acquisition. But where the federal government has enacted conflicting legislation, state law must give way.

In *Kleppe v. New Mexico*, 426 U.S. 529 (1976), the Court stated that Congress alone has the power to “prescribe the conditions upon which others may obtain rights to federal properties.” *Id.* at 540.

In *Hughes v. Washington*, the Court held that a dispute over title to lands conveyed to a party by the federal government

was controlled by federal law and that in the absence of adoption of state law, it will have no effect. 389 U.S. 290, 292-93 (1967).

In *Utah Power and Light Co. v. United States*, 243 U.S. 389 (1917), the Court rejected the argument that an Article IV property was not as protected from state law as an Article I property and noted that only through an act of Congress can rights be obtained in federal land. *Id.* at 404.

Lands of the United States acquired under Article IV, Section 3, can be said to be subject to the dual jurisdiction of both federal and state government, *but* the ultimate authority to impose rights of reverter and other incidents of title, unaffected by state law as to limitation on the exercise of such rights, is in the federal domain.

2. Federal Land Purchased With Consent of a State

Under Article I, Section 8, Clause 17 of the Constitution, Congress is granted the authority:

To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards and other needful buildings;

As to the exclusivity of federal law over an Article I property, the Supreme Court has stated that:

The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of these rules existing at the time of surrender of sovereignty which govern the rights of the occupants of the territory transferred. This assures that no area, however small, will be left without a developed legal system for private rights.

James Stewart and Co. v. Sadrakula, 309 U.S. 94, 99-100 (1940). Thus existing state law not inconsistent with any federal act stays in effect until altered by the federal government. *See*

Pacific Coast Dairy, Inc. v. Department of Agriculture of California, 318 U.S. 285, 294 (1943).

While there have been a number of cases dealing with the problem of exclusive jurisdiction over federally owned land, many of these have dealt with state laws imposing ordinary civil or criminal regulations. These statutes have been stricken down because they attempted to impose state law *within* the Article I enclave. See *Surplus Trading Co. v. Cook*, 281 U.S. 647, 656-57 (1930) (state may not tax property *within* an Article I enclave). Because House No. 1805 does not seek to regulate activities within the enclave, cases such as *Surplus Trading Co.* are not an obstacle. More important for purposes of House No. 1805 are the numerous cases holding that the title to federal lands may not be affected by state legislation.

In *Gibson v. Chouteau*, 8 U.S. (13 Wall.) 92 (1871) the Court made perhaps its broadest statement concerning the conditions upon which rights in federally owned land may be acquired:

Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise.

Id. at 99.

A particularly pertinent decision in this area is *United States v. California*, 332 U.S. 19 (1947). There, in a dispute over a strip of land lying off the California coast, the court stated that:

The government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of these interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches or failure to act.

Id. at 39-40.

Conclusion

On the basis of the above cases, representing as they do a clear intent to protect title to federal land from state law, it is extremely doubtful that House No. 1805 would withstand constitutional attack as it applies to the federal government. This

position is also in line with the Supreme Judicial Court's opinion in *Commonwealth v. Trott*, 331 Mass. 491, 494 (1954) in which it was said:

In other words ownership and use of land by the United States, without more, do not withdraw the lands from the jurisdiction of the State. The lands remain part of her land, save that the state cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal. *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650.

We do not recommend House No. 1805, but we do recommend the following Draft Act which would amend section 31A by deleting the words "other than the Commonwealth" from the first sentence of the third paragraph. Section 31A makes conditions subsequent and possibilities of reverter created prior to 1955 unenforceable if notice of such rights has not been recorded by 1964. As it presently reads, section 31A applies to all such rights, whether or not the owner is a "government, or governmental subdivision other than the commonwealth." Thus, the deletion of these words would cause the provision to apply to the Commonwealth.

The Draft Act proposed would be retrospective as well as prospective, and would apply to all grants by the Commonwealth whenever made, either before or after the effective date of the new amendment.

The possible uncertainty that might exist as to the period between 1964 and 1968 would be eliminated by this amendment.

1980 DRAFT ACT

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 31A of Chapter 260 of the General Laws is amended by striking from the first sentence of the third paragraph the words: other than the Commonwealth.

SECTION 2. Section 2 and Section 4 of Chapter 527 of the Acts of 1974, having been repealed by Chapter 356 of the Acts of

1975, the remaining sections 1, 4, 5 and 6 of said Chapter 527 are hereby repealed.

SECTION 3. This act shall be retrospective as well as prospective in its application, applying to all grants by the Commonwealth whether created before or after its effective date.

VI. ATTACHMENT OF WAGES-CHILD SUPPORT HOUSE . . . (1979) . . . No. 2955

AN ACT PROVIDING FOR THE GARNISHMENT OF CERTAIN WAGES AND
BENEFITS FOR THE PURPOSE OF FULFILLING CHILD SUPPORT
OBLIGATIONS.

*Be it enacted by the Senate and House of Representatives in General
Court assembled, and by the authority of the same, as follows:*

1 The General Laws are hereby amended by inserting after
2 Chapter 154, section 8, the following chapter: —

3 *Section 8a. Subsection 1.* Service of process in garnishment
4 proceedings under this section shall be by publication, for the
5 fulfillment of court-ordered child support obligations.

6 *Subsection 2.* All money received by any person from any state
7 or the United States as a pension, or as annuity or retirement, or
8 disability or death, or other benefits, or as a return of contributions
9 and interest, or of wages earned shall be subject to any procedure
10 available for garnishment, to enforce a court-ordered child
11 support decision.

12 *Subsection 3.* Such enforcement procedure is as follows:

13 Service of process by publication must be made by the sheriff or an
14 agent of the probate court for said district. The party seeking
15 garnishment under this section must submit the following: (1)
16 information concerning the garnishee: (a) full name; (b) social
17 security account number or date of birth; and (c) in the case of a
18 military member: branch of service; rank or grade; active duty or
19 retired status; and if known, the name and location of his or her
20 current duty station; (2) a certified copy of the court-order
21 establishing the obligation to pay child support and a certified
22 copy of the underlying judgment or order upon which the
23 garnishment or attachment proceeding is based.

During the period of 1974-1979, the Family Service Office of each division of the Probate and Family Court Department has been deeply involved in the collection and supervision of support obligations. During this time, collections have totaled over forty-one million dollars, with 1979 collections exceeding thir-

teen million dollars. This has been accomplished by judges ordering the obligor to make the payments directly to the Family Service Officer. The officer then forwards the payment to the person receiving support or, if such person is on welfare, to the Department of Public Welfare. The estimate for collections for fiscal year 1980 under this system is twenty million dollars.

A major factor in the size of this figure is the enactment of Chapter 522 of the Acts of 1979 which became effective on August 17, 1979. The major effect of Chapter 522 is to permit assignment of wages to enforce support obligations whenever the obligor is four weeks in arrears. By allowing the assignment of wages, the Act provides an enforcement mechanism far superior to the present procedure of chasing the obligor for payment.

As the objective of House No. 2955 seems to have been reached by Chapter 522, there appears to be no reason to be concerned with the bill. House No. 2955 does appear to be more ambitious than Chapter 522 in that it specifically provides that it applies to persons receiving wages or benefits from the United States. But under federal law, 42 U.S.C. §659, it would appear that the wages of servicemen or women and employees of the federal government are subject to attachment in the same manner as if the government was a private person. Thus, by construing Chapter 522 in light of federal law, it appears that most or all of the objectives sought by House No. 2955 have been achieved.

As the legislation is unnecessary, we do not recommend it.

**INDEX OF SOME
1980 HOUSE AND SENATE BILLS
ON SUBJECTS DISCUSSED IN
THIS FIFTY-FIFTH REPORT FOR 1979**

BILL NUMBER	SUBJECT MATTER	PAGE IN THIS REPORT
<i>Senate Bills</i>		
924	Wage Assignment Law	97
935	Withdrawing Public Land from Land Registra- tion Act	72
936	Economic Use of Land by Removing Ancient Impediments to Marketability	87
937	Amending Master Deed Under Chapter 183A ..	70
938	Registration of Land	61
939	Bringing the Land Court in Conformance with the Massachusetts Rules of Civil Procedure ..	74
940	Condominium Registration	67
941	Transfer of Actions Within the Trial Court Department	73
<i>House Bills</i>		
192	Support Orders in the Probate Court	97
193	Paternity and Support Proceedings	31
903	Limiting the Procedure for Maintaining a Right of Entry for Condition Broken or Possibility of Reverter	87
3055	Revised Tract Index System for the Indexing of Restrictions and Certain other Documents Affecting Land and to Eliminate the Exemp- tion of Wetlands Protection Orders	41

BILL NUMBER	SUBJECT MATTER	PAGE IN THIS REPORT
3413	Possibilities of Reverter and Rights of Entry Owned by the Commonwealth or the United States	87
3433	Wage Assignment Law	97
5540	Modern Record Keeping Procedures for Regis- tered Land	59
5542	Maintenance of Atlases of Registered Land at the Land Court	60
5563	Registration of Title to Condominiums	67
5699	Protecting Land Titles from Certain Obsolete Rights and to Provide Proceedings in Equity with Respect Thereto	87
5811	Registrars of Deeds to Establish Public Tract Indexes	41



JUDICIAL COUNCIL OF MASSACHUSETTS



FIFTY-SIXTH REPORT 1980

**JUROR SELECTION IN MASSACHUSETTS
JURISDICTION IN SPECIALIZED COURTS
RECOMMENDED IMPROVEMENTS IN THE LAND
COURT DEPARTMENT
JUDICIAL COMPENSATION
UNIFIED JUDICIAL BUDGET**

(Complete Table of Contents on Pages 1-3)



FIFTY-SIXTH REPORT

Judicial Council of Massachusetts

—1980—

CONTENTS OF THIS REPORT

MEMBERSHIP OF THE JUDICIAL COUNCIL	6
THE ACT CREATING THE JUDICIAL COUNCIL	7
INDEX OF SOME 1981 HOUSE AND SENATE BILLS ON SUBJECTS DISCUSSED IN THIS REPORT	5
I. JUROR SELECTION IN MASSACHUSETTS	9
A. Evaluation of Present Selection Methods	11
1. Selection Procedures	11
a. Juror Selection Under G.L. Chapter 234	11
b. Middlesex Juror Selection Under G.L. Chapter 234A	13
2. Fair and Representative Cross Section	15
a. Random Selection	15
b. Statutory Exemptions	17
c. Demographic Analysis of Jury Distributions	18
3. Juror Utilization	24

4. Financial Analysis	26
a. Juror Compensation	26
b. Administrative Costs	27
c. Total Cost Analysis	27
5. Court Time	28
6. Burdens on Cities and Towns	28
7. Verdicts	29

B. Expansion of the Middlesex System to All

Counties in the Commonwealth	31
1. Outline of the System and Legislative Development	31
a. Implementation of the New Jury System	32
b. Juror Qualifications and Exemptions from Service	33
c. Administration of the New Jury System	35
d. Selection Procedures	36
e. Summoning Procedures	37
f. Juror Utilization and Management	39
g. Juror Compensation	41
h. Penalties and Enforcement	43
i. Challenge to Jury Pools	45
2. Comparison with G.L. Chapter 234A	46
3. Evaluation of Expanding the Middlesex Jury System	48

C. Recommendations 50

II. TRIAL COURT STATISTICS 77

A. Evaluation of Statistical Data Reported

By the Trial Court	78
------------------------------	----

B. Suggested Statistical Methodologies 84

1. Disposition Analysis	84
2. Dispositions Per Week	86
3. Dispositions Per Judge	86
4. Pending Case Analysis	87
5. Age of Pending Caseload	87
6. Projected Workload Analysis	88
7. Weighted Caseload Analysis	88
8. Judicial Assistance	89

C. Policy Recommendations for the Improvement of Statistical Data	90
D. Conclusion	92
III. JURISDICTION IN SPECIALIZED DEPARTMENTS OF THE TRIAL COURT	93
A. Removal of Equity Cases from the Probate and Family Court Department	93
B. Enlarging the Exclusive Original Jurisdiction of the Land Court Department	96
C. Transfer of Actions within the Trial Court ...	99
IV. TECHNICAL IMPROVEMENTS IN THE LAND COURT DEPARTMENT	101
A. Improving Land Registration Procedures	101
B. Expediting Recovery from the Assurance Fund	104
C. Establishing a Title Integrity Commission	107
D. Improving the Storage of Land Records	109
E. Conformity of Land Court Rules with the Massachusetts Rules of Civil Procedure	111
V. INTEREST IN LAND OWNED BY PUBLIC ENTITIES	123
A. Withdrawal of Public Land from the Land Registration Act	123
B. Removing Possibilities of Reverter and Rights of Entry Owned by the Commonwealth	124
VI. CONDOMINIUM LEGISLATION	127
A. Procedures for Condominium Registration ..	127
B. Procedure for Amending Condominium Master Deeds	130
VII. JUDICIAL COMPENSATION COMMISSION .	132
VIII. UNIFIED JUDICIAL BUDGET	135



The Commonwealth of Massachusetts

February, 1981

THE HONORABLE EDWARD J. KING
Governor of Massachusetts

Dear Governor King:

In accordance with the provisions of Chapter 221, Section 34A of the General Laws, we have the honor to transmit the fifty-sixth report of the Judicial Council for the year 1980.

JACOB J. SPIEGEL, CHAIRMAN
PAUL T. SMITH, VICE CHAIRMAN
SALLY CORWIN
E. GEORGE DAHER
HARRY J. ELAM
CLIFFORD E. ELIAS
ANDRE A. GELINAS
DONALD R. GRANT
THOMAS R. MORSE, JR.
ALFRED L. PODOLSKI
WILLIAM I. RANDALL
JAMES G. REARDON

**1981 HOUSE AND SENATE BILLS
DISCUSSED IN THIS REPORT**

BILL NUMBER	SUBJECT MATTER	PAGE IN THIS REPORT
<i>House Bills</i>		
5774	Removal of Equity Cases from the Probate and Family Court Department	93
5776	Establishing the Judicial Compensation Commission	132
5816	Expansion of the Middlesex Jury System to All Counties in the Commonwealth	51
<i>Senate Bills</i>		
689	Establishing a Title Integrity Commission in the Land Court	107
691	Transfer of Actions Within the Trial Court	99
692	Facilitating Condominium Registration	127
693	Storage of Land Records by Electronic and Other Methods	109
694	Actions Commenced Against the Assurance Fund of the Land Court Department	104
695	Bringing the Land Court into Conformance with the Massachusetts Rules of Civil Procedure ..	111
696	Improving Land Registration Procedures	101
958	Enlarging the Exclusive Original Jurisdiction of the Land Court Department	96
1752	Withdrawal of Public Land from the Registered Land System	123
1753	Amending Condominium Master Deeds	130
1754	Reversionary Interests Owned by the Commonwealth	124

MEMBERS OF THE COUNCIL
(JANUARY 1981)

JACOB J. SPIEGEL *of Boston*, CHAIRMAN
PAUL T. SMITH *of Boston*, VICE CHAIRMAN
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WILLIAM I. RANDALL *of Framingham*
JAMES G. REARDON *of West Boylston*

JAMES B. MULDOON *of Weston*, SECRETARY
Two Center Plaza, Boston, Mass. 02108

INQUIRIES CONCERNING THE JUDICIAL COUNCIL

Copies of this report are sent to all members of the legislature, judges, clerks of court, libraries, city and town clerks, and many others.

Persons interested in matters under consideration by the Judicial Council and in the improvement of the judicial system of the Commonwealth are invited to communicate with the Secretary of the Judicial Council, James B. Muldoon, 2 Center Plaza, Boston, Massachusetts 02108.

JUDICIAL COUNCIL**G.L. Chapter 221, §§34A-34C**

The Judicial Council was established to make a continuous independent study of the organization, procedure, and practice of the courts.

The Council makes recommendations requested by the legislature and suggests improvements in the administration of justice.

Statutory Authority

Section 34A. There shall be a judicial council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the appeals court or some other justice or former justice of that court appointed from time to time by him; the administrative justice for each department of the trial court or some other justice or former justice appointed to said department, or division thereof as the case may be, or to a predecessor court of said department or division, appointed from time to time by said administrative justice; and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods, not exceeding four years, as he shall determine.

Section 34B. The judicial council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

Section 34C. No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof, shall receive from the commonwealth a salary of ten thousand dollars.

I. JUROR SELECTION IN MASSACHUSETTS

A. Evaluation of Present Selection Methods

1. Selection Procedures

- a. Juror Selection Under G.L. Chapter 234**
- b. Middlesex Juror Selection Under G.L. Chapter 234A**

2. Fair and Representative Cross Section

- a. Random Selection**
- b. Statutory Exemptions**
- c. Demographic Analysis of Jury Distributions**

3. Juror Utilization

4. Financial Analysis

- a. Juror Compensation**
- b. Administrative Costs**
- c. Total Cost Analysis**

5. Court Time

6. Burdens on Cities and Towns

7. Verdicts

B. Expansion of the Middlesex System To All Counties in the Commonwealth

1. Outline of the System and Legislative Development

- a. Implementation of the New Jury System**
- b. Juror Qualifications and Exemptions from Service**
- c. Administration of the New Jury System**
- d. Selection Procedures**
- e. Summoning Procedures**
- f. Juror Utilization and Management**
- g. Juror Compensation**
- h. Penalties and Enforcement**
- i. Challenge to Jury Pools**

2. Comparison with G.L. Chapter 234A**3. Evaluation of Expanding the Middlesex Jury System****C. Recommendations****I. JUROR SELECTION IN MASSACHUSETTS**

Juror selection in the Commonwealth is governed by two statutory schemes. Chapter 234 establishes selection procedures for all counties in the Commonwealth with the exception of Middlesex County. Selection procedures in Middlesex County are regulated by G.L. Chapter 234A, added in 1977.

In our Fifty-Fifth Annual Report, we endorsed the concept of improved juror utilization and management as embodied in G.L. Chapter 234A. We refrained, however, from commenting on specific legislative proposals which would have expanded the system to all counties in the Commonwealth. The time has come for such an examination.

The representativeness of jury pools selected under G.L. Chapter 234 was recently examined by the Supreme Judicial Court. In *Commonwealth v. Bastarache*,¹ the Court held that the juror selection process employed by Franklin County was not unconstitutional. In reaching its decision, the Court found that the underrepresentation of young people on grand and trial juries did not violate the sixth and fourteenth amendments.² The Court also noted, in dicta, that these selection procedures did not violate article 12 of the Declaration of Rights. This conclusion was based on the fact that "age" was not a distinctive group recognized in article 1 of the Declaration of Rights, and that there was no tension based on differences in age between the defendant and victim.³

While the Bastarache Court found no constitutional or statutory violations, it questioned current juror selection procedures under Chapter 234. Pursuant to its authority to oversee

¹ 1980 Mass. Adv. Sh. 2465.

² *Id.* at 2478.

³ *Id.* at 2479.

the administration of justice, G.L. Chapter 211, §3, the Court took notice of the “undesirable consequences of the procedures by which jury lists have been prepared in most towns in Franklin County.”⁴ Also recognized was the fact that problems may exist in other counties in the Commonwealth. The Court concluded:

We, therefore, ask the Attorney General of the Commonwealth, with the assistance of others of his own choosing, to prescribe procedures for the compilation of jury lists in those cities and towns that are not now using a substantially random selection process. In some instances, it may be appropriate to suggest that jury lists be completely reconstituted as soon as is practicable. In other cases, change in present practices may fairly take place as new annual compilations of jury lists are made. Of course, the Legislature may determine to expand the principles of the Middlesex County jury system, or some modification of it, to other counties in the Commonwealth. In any event, prompt attention should be given to this matter.⁵

Clearly, an investigation of jury selection is warranted.

A. EVALUATION OF PRESENT SELECTION METHODS

Critical analysis of juror selection should involve several factors: a comparison of the selection procedures, whether the system insures that the jury pool will be a fair and representative cross section of the judicial district, whether the system provides for the efficient use of juror services, whether the system is economically efficient, whether the system makes efficient use of court time, whether the system imposes administrative burdens on cities and towns and whether the system results in varying verdicts on almost identical facts.

1. Selection Procedures

a. Juror Selection Under G.L. Chapter 234

Under this Chapter, the board of election commissioners, board of registrars of voters or town selectmen are primarily responsible for preparing juror lists. Local boards are required

⁴ *Id.* at 2480.

⁵ *Id.* at 2481.

to select individuals who are “of good moral character and sound judgment.” The Chapter mandates that the local boards assess a juror’s qualifications either through personal knowledge, appearance or by evaluating juror questionnaires.

Under Chapter 234, §1 any person qualified to vote for representatives to the General Court, is eligible for jury duty, whether or not he is registered to vote. However, in selecting jurors, local boards must exclude from service those individuals who are exempt. The section establishes numerous exceptions.

The governor; lieutenant governor; members of the council; state secretary; members and officers of the senate and house of representatives during a session of the general court; judges and justices of a court; county commissioners; clerks of courts and assistant clerks and all regularly appointed officers of the courts of the United States of the commonwealth; registers of probate and insolvency; registers of deeds; sheriffs and their deputies; constables; marshals of the United States and their deputies, and all other officers of the United States; attorneys at law; settled ministers of the gospel; officers of colleges; preceptors and teachers of incorporated academics; registered practicing physicians and surgeons; superintendents’ officers and assistants employed in or about a state hospital, insane hospital, jail, house of correction, state industrial school or state prison; teachers in public schools; enginemen and members of the fire department of Boston, and of other cities and towns in which such exemption has been made by vote of the city council or the inhabitants of the town; Christian Science practitioners and readers, respectively; trained nurses; assistants in hospitals; attendant nurses; members of religious orders.

A parent or person having custody of and being responsible for the daily supervision of a child under fifteen years of age may elect not to have his name placed on the list of jurors and in such event he shall be treated as a person exempt from jury duty under this section.

A person seventy years of age or over may elect not to have his or her name placed on the list of jurors and in such event he or she shall be treated as a person exempt from jury duty under this section.⁶

As a result of the foregoing exceptions, many inhabitants of a city or town never appear on the initial jury list.

Local boards are required to prepare this list annually by the

⁶ Mass. Gen. Laws ch. 234, §1.

first of July. These lists are then delivered to the Supreme Judicial Court and to the local Superior Court in that county before August 1 of each year.

Chapter 234, §10 requires the clerk of the Supreme Judicial Court and the clerk of the Superior Court to issue writs of *venire facias* before each sitting “or at other times.” The number of required jurors is then apportioned among the cities and towns of each judicial district according to their respective populations. Section 12 of Chapter 234 allows either court to issue *venires* for additional jurors when necessary.

Venires are delivered to the sheriff for each county who in turn presents the *venires* to the deputy sheriff for each city and town. The *venires* are then presented to the local board responsible for juror selection.

Jurors are selected by drawing their names from a “ballot” box. Each city or town is required to place the names of all eligible jurors from its Juror List in the box for selection. The drawing must take place no later than twenty days before the beginning of juror service. A juror receives his summons at least fourteen days before the time the juror is required to attend, unless additional jurors are summoned under section 12 of Chapter 234.

Local constables or deputy sheriffs are required to notify jurors either by reading to the juror the *venire* or by leaving notice at the juror’s place of abode. Section 24a of Chapter 234 allows for notification by mail if made at least twenty days prior to the time when the juror is required to attend. This section also requires a juror to complete, and return, a juror confirmation no later than two days after receipt.

b. Middlesex Juror Selection Under G.L. Chapter 234A

Chapter 234A radically altered juror selection in Middlesex County. The statute eliminated the occupational exemptions and instituted new procedures for the selection of jurors.

The selection process is coordinated by the Office of Jury Commissioner. This office is given the authority to promulgate rules and regulations concerning juror selection, subject to the approval of the Supreme Judicial Court.

The selection process begins with the cities and towns. On or before the first day of June, each locality must prepare a Local Resident List, consisting of all persons seventeen years of age

or older who reside in their city or town. Each inhabitant receives a number and is listed in alphabetical order. The list must be delivered, either by personal delivery or registered mail, to the jury commissioner by this date.

The jury commissioner is responsible for determining the number of prospective jurors to be drawn from each locality. The following formula is used:

$$\begin{array}{lcl} \text{Prospective} & & \text{The Number of} \\ \text{Jurors to be} & = \frac{\text{Population of Each Town or City}}{\text{Population of Judicial District}} \times & \text{Jurors Required} \\ \text{Drawn} & & \text{for each Judi-} \\ & & \text{cial District} \end{array}$$

Population figures for each locality are taken from the Local Resident Lists. Aggregating these lists yield the population for each judicial district. In calculating judicial needs, the commissioner is required to consider past experience and anticipated work loads. The jury commissioner must complete this procedure by the first of July for each year.

By the first day of August, the jury commissioner generates a sequence of random numbers for each locality. The sequence is based on the total number of inhabitants for each city and town as supplied by the Local Resident List. The commissioner then selects numbers from this list randomly. These randomly selected numbers are then compiled and make up the sequence. The total number selected is equal to the number of jurors required to serve from that particular locality. Each randomly selected number in the sequence corresponds to a numbered individual on the Local Resident List. A random sequence is generated for each locality.

Once prepared, the Office of Jury Commissioner delivers the random sequence to each city and town. Localities with a population of more than 25,000 must prepare a data processing record for each resident whose number on the Local Resident List also appears in the random sequence. Localities with a population of 25,000 or less are given the option to prepare data processing records or complete special forms suitable for data processing. The forms are provided by the Office of Jury Commissioner. The data processing records or the forms are delivered to the Office of Jury Commissioner by the first day of September. The jury commissioner must prepare data processing records for those localities submitting forms. This must be completed by the first day of October for each year.

The Office of Jury Commissioner then compiles a Prospective Juror List for each city and town from the data processing records. The list is to be completed by October first of each year and is available for public inspection. The jury commissioner also compiles a Master Juror List for Middlesex County. The Master Juror List is simply the aggregate of all the Prospective Juror Lists. The Master Juror List serves as the list from which actual jurors will be selected.

Seventy days prior to the time when grand or trial jurors are to begin service, the clerk of each court in Middlesex County notifies the commissioner of the number of jurors required. Grand juror venires are required to state the estimated length of term. Trial juror venires are required to state the period of juror service and the number of jurors needed for each period.

At least sixty days prior to the beginning of any term of grand or trial juror service, the jury commissioner is obligated to determine the number of jurors required for each judicial district. The jury commissioner then randomly selects the actual jurors for each judicial district from the Master Juror List. Summonses must be delivered to each juror by this date. Delivery may be made by certified or first class mail.

2. Fair and Representative Cross Section

Analyzing the representativeness of jury pools involves consideration of the procedures established to guarantee random selection and the types of individuals excluded under statutory exemptions. According to these criteria, the Middlesex system is superior to the system established under Chapter 234.

a. Random Selection

Random procedures must be established and strictly followed in order to obtain a jury which is a fair and representative cross section of the population. Accordingly, procedures which allow for discretionary determinations militate against a selection which is truly representative.

Chapter 234, §4 requires each locality to place on their jury lists only those individuals who are of "good moral character." Such a determination is highly subjective. Many cities and towns do not have the resources to investigate the moral character of every person placed on the list. Officials responsible for selecting jurors may tend to select individuals whom they

personally know to be of good character. The result may be the unintentional exclusion of certain segments of a town's population. In addition, the system subjects local officials to undue pressure from individuals desiring to either avoid or be chosen for jury duty.

However, Chapter 234 does contain several procedures designed to insure random selection. Section 4 requires that a jury list include no less than one juror for every one hundred inhabitants and no more than one juror for every sixty inhabitants. Section 10 requires each court to apportion venires among the cities and towns according to their respective populations. Finally, sections 18 and 19 provide for random selection by the random drawing of jurors from a jury "ballot" box.

These procedures, however, do not guarantee a random and representative selection. All these requirements assume that the initial jury list is randomly drawn. If it is not, these procedures will not cure its defects. For example, selecting one juror for every one hundred inhabitants merely insures that enough jurors will be selected to meet judicial needs. It does not address the issue of whether those selected are representative of a locality's population. Apportioning venires to each locality according to its population may result in each locality being fairly represented. This procedure will not, however, guarantee that those selected from each locality are a representative cross section of the inhabitants of each town. As a result, there is no guarantee that the jury pool will be a fair cross section of the entire judicial district. Finally, the random drawing of jurors from the jury "ballot" box will not insure that a representative cross section is drawn. Since the names in the jury box were not randomly selected, a random drawing is not likely to yield a representative cross section of the entire community.

Therefore, jurors selected under Chapter 234 are not necessarily representative of the population. Discretionary decisions by localities as to the composition of initial jury lists defeat any subsequent attempts to achieve a random sample of the population. In addressing this problem, the Court in *Bastarache*, concluded:

[W]e find in §1 [ch. 234] no separate requirement of the use of a random selection process or of a proportionate distribution on jury lists of citizens based on their ages.⁷

⁷ 1980 Mass. Adv. Sh. at 2472.

Consequently, there are no present statutory requirements other than in Middlesex County mandating random selection.

The procedure for selecting jurors in Middlesex County differs dramatically from the procedure employed under G.L. Chapter 234.

The cities and towns in Middlesex County are not authorized to determine whether an individual is a "qualified" juror. Instead, they are required to compile a Local Resident List. In preparing this list, each locality must include every inhabitant over seventeen years of age. This totally eliminates local discretion. As a result, the initial list provides a more representative cross section of the population of each locality.

In addition to eliminating local discretion, the Middlesex system establishes a two step random procedure. The first randomization occurs when the Office of Jury Commissioner generates the sequence of random numbers. A second randomization takes place when the jurors are actually selected from the Master Jury List. These procedures insure that jurors will be selected at random, thereby increasing the probability that a jury will be a fair and representative cross section of the population.

b. Statutory Exemptions

A second factor which must be considered is the exclusion of certain groups by statute. G.L. Chapter 234, §1 creates numerous exemptions including doctors, lawyers, nurses, ministers, law enforcement officials, teachers, firemen, parents supervising children under 15 years of age, etc. . . . These exemptions preclude large segments of the population from serving as jurors.

These exemptions have been eliminated under the Middlesex system. A juror is considered competent to serve unless: the juror is not *qualified* to vote for representatives to the General Court; is unable to understand English; is under eighteen years of age; has been convicted of a felony within seven years; is incapable of serving by reason of a physical or mental disability; has served as a juror in the previous three years; is not an American citizen or resident of Middlesex County. Clearly, jurors selected under this system represent more diverse segments of the population.

c. Demographic Analysis of Jury Distributions

Whether jurors selected under the Middlesex system are more representative than those selected under Chapter 234, is an empirical question. Unfortunately, the data necessary to conduct an in depth examination is unavailable. For the most part, this is due to the lack of demographic information from those counties selecting jurors under Chapter 234.

Demographic information pertaining to the composition of juries in Middlesex County was compiled by the Office of Jury Commissioner. In conducting its analysis, the Office of Jury Commissioner compared the demographic composition of actual juries with the demographic composition of the Master Jury List. The Master Jury List served as a proxy for the demographics of the entire population. Thus, there was no *direct* comparison between actual juries and the population. Justification for this methodology was based on the fact that the demographic composition of the Master Jury List is almost identical to the demographic composition of Middlesex County.

Despite the paucity of data some general observations can be made. In this respect, consideration should be given to the age, sex, occupation and geographic distributions of jurors selected under the two systems.

An analysis of age reveals that jurors selected under the Middlesex system tend to be younger than those selected under G.L. Chapter 234. The mean average age of jurors serving in 1979 was 41.28 years of age. Over 50% of the jurors who served were 41.5 years of age or younger and approximately 25% of the jurors who served were under 28 years of age. The mean average age of individuals on the Master Juror List was 43.65 years of age. Approximately 50% of the individuals on the Master Juror List were under 41 years of age and 26% were under 28 years of age. According to the Office of Jury Commissioner, this may be due to the large number of college students living in Middlesex County.

The crucial question, however, is whether the age breakdown of jurors who served accurately reflects the total population of Middlesex County. Assuming that the Master Juror List is a valid proxy for the entire population, there appears to be a fairly close relationship between the composition of jurors who served and the population of Middlesex County. When broken

down on a yearly basis, the percentage representation by age of individuals on the Master Juror List and actual jurors differs by less than one percent. Individuals ranging in ages from 30 to 60 have a higher percentage representation on actual juries than they do on the Master Juror List. Alternatively, individuals over 65 tended to be underrepresented on juries. This age bracket comprised approximately 13.04% of all individuals on the Master Juror List but accounted for only 6.21% of jurors who actually served. The major reason for this discrepancy is that these individuals are more likely to obtain medical exemptions than their younger counterparts. (See Table 1.)

TABLE 1
AGE DISTRIBUTIONS
MIDDLESEX COUNTY 1979

Age Bracket	Percentage Representation		
	Actual Jurors	Master Juror List	Difference In Representation
18.5 - 20.5	6.00%	6.20%	- .20%
20.5 - 25.5	11.97%	12.54%	- .57%
26.5 - 30.5	10.49%	10.81%	- .32%
30.5 - 35.5	10.77%	9.83%	+ .94%
35.5 - 40.5	9.51%	8.11%	+ 1.40%
40.5 - 45.5	9.00%	7.31%	+ 1.69%
45.5 - 50.5	9.55%	7.67%	+ 1.88%
50.5 - 55.5	9.54%	7.79%	+ 1.75%
55.5 - 60.5	8.35%	7.18%	+ 1.17%
60.5 - 65.5	5.58%	5.77%	- .19%
65.5 - 70.5	3.66%	4.70%	- 1.04%
70.5 - 75.5	1.75%	3.81%	- 2.06%
75.5 - 80.5	.61%	2.57%	- 1.96%
80.5 - 85.5	.17%	1.71%	- 1.54%
85.5 - 90.5	.02%	.87%	- .85%
over 90	.00%	.33%	- .33%

A negative number in the Difference column indicates that the particular age bracket is under-represented on Actual Juries as compared to the Master Juror List.

Prepared by the Judicial Council from data supplied by The Office of Jury Commissioner for Middlesex County.

Ultimately, the issue is whether the Middlesex system provides for a better cross section of the population than jurors selected under Chapter 234. In *Commonwealth v. Bastarachi*, the census figures demonstrated that 36% of the population was between the ages of 18 and 34.⁸ Only 18.5% of the persons on the jury list, however, were from this age bracket, creating a disparity of 17.5%. In Middlesex County, the disparity between the Master Juror List and those jurors who actually served was only .09% for this age group. Assuming that the Master Juror List is an accurate reflection of the total population, then the Middlesex system is clearly superior.

A second demographic category which must be considered is the distribution by sex. In 1979, the composition of the Master Juror List in Middlesex County was 53.1% female and 46.9% male. Representation of males on actual juries increased to 49.5% and decreased to 50.5% for females. One explanation for the difference is that women, especially those having young children, tend to postpone jury service more often than men. Also, women comprise a greater percentage of senior citizens than men. As a result, women tend to obtain medical exemptions more often than their male counterparts.

There is no guarantee that juries selected under Chapter 234 will be representative according to sex. In *Brunson v. Commonwealth*,⁹ the Court addressed this issue. In that case the Court found that although women constituted about 54% of the population of the city of Boston, they comprised only 26% of the jury list and about 30% of the jurors who served.

Given the lack of data, any comparison between the Middlesex system and Chapter 234 is best speculative. As the *Brunson* case demonstrates, however, juries selected under Chapter 234 may not always provide for a representative cross section of the population.

Economic status data was reported by the Office of Jury Commissioner for Middlesex County. The data was subdivided into eleven "occupational" categories: professional-I, professional II, self-employed, business-I, business II, trade, public, homemaker, student, retired and unemployed. The professional-I category includes professions such as a doctor or

⁸ *Id.* at 2467.

⁹ 369 Mass. 106 (1975).

lawyer. Included in the professional II classification are occupations such as nurses. In general, the professional-I category is supposed to represent a higher economic bracket than the professional II category. The same relation exists between the business-I and business II classifications.

Homemakers constituted the largest occupational group on the Master Juror List followed by the business II, professional II, students, trade, professional-I, retired, business-I, public, self-employed and unemployed categories. A different distribution was obtained for those individuals who actually served. Homemakers was the largest category followed by business II, students, professional-I, professional II, trade, business-I, public, retired, unemployed and self-employed. (See Table 2.)

This data is far from conclusive. The results were obtained from samples of 1,000 individuals from the Master Juror List and actual jurors. Classification according to broad occupational groups is always difficult. The problem is exacerbated by the fact that the information is based on job descriptions supplied by the jurors themselves. These descriptions are not always susceptible to accurate classification. Finally, there is no necessary relation between occupation and economic status.

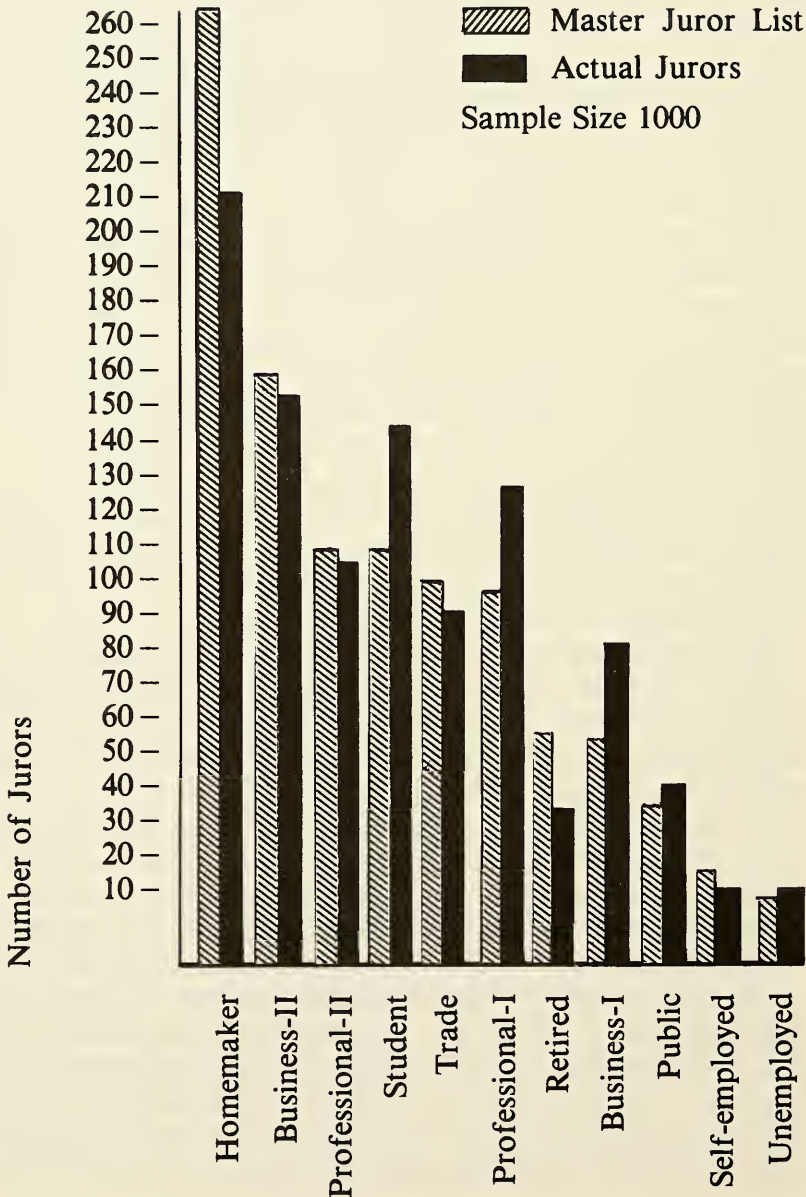
Despite its inconclusive nature, the data demonstrates the diverse backgrounds of jurors in Middlesex County. Because of the numerous occupational exemptions, such diversity is difficult to obtain under G.L. Chapter 234.

Another demographic consideration is the geographic distribution of the jury. Chapter 234 requires each court to apportion venires among the localities according to their respective populations. This procedure should provide for a fair geographic representation.

Under the Middlesex system, venires are not directly apportioned to each locality. Random procedures, however, achieved the same result. In most cases, there was less than a one percent difference between the percentage of jurors from each locality on the Master Juror List and those who actually served.

The greatest difference occurred in the city of Cambridge. Approximately 6.5% of the individuals on the Master Juror List were from Cambridge. Only 4.9% of the actual jurors, however, were from this city. This 1.6% difference indicates that the city was slightly underrepresented on actual juries. Newton had the second greatest difference with an underrepre-

TABLE 2
DISTRIBUTION OF JURORS
MIDDLESEX COUNTY, 1979
BY OCCUPATION



sentation of .99%. One explanation for the underrepresentation of these cities is that both have large student populations. (See Table 3.)

TABLE 3
GEOGRAPHICAL DISTRIBUTIONS
MIDDLESEX COUNTY 1979

Cities	Percentage Representation		Percentage Difference in Representation
	Actual Jurors	Master Juror List	
Action	1.325%	1.448%	— .123%
Arlington	4.202%	3.993%	+ .209%
Ashby	0.189%	0.160%	+ .029%
Ashland	0.658%	0.703%	— .045%
Ayer	0.249%	0.286%	— .037%
Bedford	0.982%	0.867%	+ .115%
Belmont	2.216%	2.170%	+ .046%
Billerica	2.653%	2.243%	+ .410%
Boxborough	0.189%	0.207%	— .018%
Burlington	1.929%	1.635%	+ .294%
Cambridge	4.853%	6.528%	— 1.675%
Carlisle	0.283%	0.230%	+ .053%
Chelmsford	2.408%	1.995%	+ .413%
Concord	1.300%	1.246%	+ .054%
Dracut	1.612%	1.442%	+ .170%
Dunstable	0.069%	0.102%	— .033%
Everett	2.959%	2.930%	+ .029%
Framingham	4.337%	4.892%	— .555%
Groton	0.384%	0.386%	— .002%
Holliston	0.963%	0.862%	+ .101%
Hopkinton	0.497%	0.441%	+ .056%
Hudson	1.092%	1.150%	— .058%
Lexington	2.578%	2.365%	+ .213%
Lincoln	0.403%	0.389%	+ .014%
Littleton	0.522%	0.460%	+ .062%
Lowell	6.037%	6.495%	— .458%
Malden	4.117%	4.216%	— .099%
Marlborough	1.920%	2.162%	— .242%
Maynard	0.787%	0.721%	+ .066%

Cities	Percentage Representation		Percentage Difference in Representation
	Actual Jurors	Master Juror List	
Medford	4.636%	4.486%	+ .150%
Melrose	2.622%	2.318%	+ .304%
Natick	2.342%	2.117%	+ .225%
Newton	5.782%	6.779%	- .997%
N. Reading	0.941%	0.827%	+ .114%
Pepperell	0.567%	0.493%	+ .074%
Reading	1.961%	1.678%	+ .283%
Sherborne	0.264%	0.290%	- .026%
Shirley	0.277%	0.280%	- .003%
Somerville	5.033%	5.582%	- .549%
Stoneham	1.731%	1.654%	+ .077%
Stow	0.415%	0.330%	+ .085%
Sudbury	1.187%	1.001%	+ .186%
Tewksbury	1.750%	1.521%	+ .229%
Townsend	0.478%	0.440%	+ .038%
Tyngsborough	0.378%	0.383%	- .005%
Wakefield	1.920%	1.916%	+ .004%
Waltham	3.837%	4.350%	- .513%
Watertown	2.499%	2.506%	- .007%
Wayland	1.042%	0.937%	+ .105%
Westford	0.991%	0.906%	+ .085%
Weston	0.960%	0.978%	- .018%
Wilmington	1.586%	1.186%	+ .400%
Winchester	1.851%	1.677%	+ .174%
Woburn	3.236%	2.642%	+ .594%

A negative number in the Difference Column indicates that the city or town is underrepresented on Actual Juries as compared to the Master Juror List.

Prepared by the Judicial Council from data supplied by the Office of Jury Commissioner for Middlesex County.

While the above data is far from conclusive, it indicates that juries selected under the Middlesex system tend to be more representative of the population than those selected under Chapter 234.

3. Juror Utilization

The most significant difference between the Middlesex system and G.L. Chapter 234 is the length of juror service. Trial

jurors selected under Chapter 234 are required to serve for one month. Jurors selected in Middlesex County are obligated to serve for one day or one trial. Under this system, 95% of the jurors serve less than three days, 91% serve two days or less, and 82% serve only one day. Grand jurors serve a three month term in Middlesex County as compared to a six month term under Chapter 234.

Through random selection and the elimination of occupational exemptions, the Middlesex system results in a greater cross section of the population for juror service.

Of additional significance is the fact that shorter periods of service results in exposing a greater number of individuals to the judicial system. According to the Office of Jury Commissioner, the selection process will make a complete survey of the adult population every 20-25 years. It is estimated that the average adult will serve less than one day per decade.

The Middlesex system also eliminates many of the disruptions associated with jury duty. Jurors have a statutory right to one postponement for up to ten months. Summonses are delivered sixty days in advance in Middlesex County as compared to fourteen days under Chapter 234. In addition, a juror may be placed on standby under the Middlesex system. Jurors placed on this status are not required to appear at court unless they are needed. Instead, they merely telephone the jury commissioner in order to determine whether they will be required to appear at court. Jurors are allowed to change the location of their service upon a showing of hardship.

Jurors are also better informed of their responsibilities. Ten days prior to the beginning of their service, a juror is given a handbook containing an outline of all the duties of a juror. In addition, the handbook provides practical information such as directions to the courthouse. Upon arrival, jurors are informed of the court's procedures. They watch a video tape and are greeted by a judge. In most cases, they are told whether they will be called for an afternoon session before the luncheon recess.

In sum, the Middlesex system provides for the needs of the juror. Unlike Chapter 234, a juror is given the opportunity to select a time which is convenient for him. Since the period of service is shorter, jurors are more willing to fulfill their obligations. The result is a positive judicial experience.

The true test of a juror selection system is whether it provides

enough jurors to meet judicial requirements. In only one instance has the Middlesex system failed to provide enough jurors. The incident occurred when too many jurors were sent home after lunch, leaving an inadequate number of jurors for the afternoon session. If a shortage does occur, the jury commissioner merely notifies the standby jurors. This appears to be a method superior to the concept of pulling jurors off the street.

4. Financial Analysis

Achieving a representative cross section of the community should be the primary objective of a juror selection process. Simply stated, the issue is the amount of money which the Commonwealth is willing to spend in order to adopt a system which enhances the representativeness of a jury.

A one day or one trial system need not increase judicial costs. On the contrary, this system, when coupled with computerized management techniques, may result in a net savings to the Commonwealth.

a. Juror Compensation

In 1978, juror selection in Middlesex County was governed by G.L. Chapter 234. This Chapter authorized juror compensation of \$14.00 per day plus transportation. In order to meet judicial needs, Middlesex County paid \$842,036.32 in juror compensation. This figure decreased by 63.7% during the first year of the new Middlesex system. Total compensation for grand and trial jurors amounted to only \$305,960.95 in 1979, resulting in a net savings of \$536,075.97. This savings was realized because 95% of the approximately 32,000 trial jurors who served were compensated by their employers. Under the Middlesex system, the state does not compensate jurors, except in cases of extreme hardship, for the first three days of service. State compensation, up to \$40.00 per day, begins with the fourth day of service. The state, therefore, was responsible for compensating only 5% of the trial jurors which amounted to \$233,160.35.

Compensation for grand jurors in Middlesex County amounted to \$72,800 in 1979. Approximately 100 grand jurors served during this period. Payments by the state began with the fourth day of service. Some jurors, however, received full pay-

ment by their employer during the entire period. As a result, these jurors received double compensation. While an individual should not, as a matter of principle, suffer economically, he should not receive a bonus for service as a juror. The double compensation problem should be rectified.

b. Administrative Costs

Chapter 234A centralized juror selection procedures in Middlesex County. The total administrative expenses for 1979 were as follows:

Personnel	\$210,000
Postage	80,000
Data Processing	35,000
Copy Machine Rental	3,000
Labelling Machine Rental	3,000
Typewriter/Videotape	500
In State Travel	750
Office Supplies	4,000
TOTAL	\$336,250

Services such as space, heat, light and custodial service were provided by the state or county. In addition, the Trial Court provided a substantial amount of computer and ancillary services. Legal representation was provided by the Attorney General's Office. Consequently, expenses would have been much greater if these services were not provided.

Under Chapter 234, summonses were delivered by constable at a cost of several dollars per juror. The average cost under the Middlesex system was \$1.07 per juror. This figure included the costs of summonses, confirmations, notices of postponement, handbooks, work certificates and other forms.

c. Total Cost Analysis

Total costs for juror compensation and administration under the new system amounted to \$642,210. This figure is \$199,826 less than the total juror compensation costs for the previous year. Thus, even with increased administrative expenditures, the new system still resulted in a net savings of approximately \$200,000.00¹⁰

¹⁰ This analysis does not include a \$200,000 grant from the LEAA.

This net figure underestimates the potential savings of the new system. The juror compensation savings were calculated by comparing the 1979 and 1978 juror requirements. Court reorganization, however, dramatically increased the demand for jurors in 1979. If Middlesex County had been operating under Chapter 234 in 1979, juror compensation would have exceeded the \$842,036 figure. Thus, the new system was able to secure the services of more jurors for less than half the cost.

5. Court Time

Despite the "screening" process conducted by local boards under Chapter 234, many jurors arriving at court do not wish to serve. As a result, judges must spend a significant amount of time hearing petitions from those jurors who claim undue hardship. In many instances, these petitions are legitimate. The procedure, however, is extremely time consuming.

The Middlesex system reduces the time spent in hearing these petitions. Medical exemptions and other issues of competency are handled administratively by the Office of Jury Commissioner. Approximately 30% of the potential jurors are screened out by this process. The ability to postpone service for ten months, change location, and knowledge that service will be limited to one day or one trial also decreases the number of hardship hearings.

6. Burdens on Cities and Towns

Under Chapter 234, local officials are responsible for determining whether an individual is qualified for jury duty. This obligation imposes an undue burden. Town officers or selectmen must either take the time to investigate the character of every person on the jury list or select only personal acquaintances. During this process, local officials are subject to pressure from individuals who desire to serve or wish to avoid jury duty.

Selection under the Middlesex system removes these burdens. Local officials are only required to prepare Resident and Prospective Jury Lists. The cost, in terms of time and money, is minimal. For the most part, these lists are merely ancillary to the preparation of the annual census. Thus, the administrative costs associated with the Middlesex system are marginal.

7. Verdicts

Elimination of the occupational exemptions coupled with the one day or one trial system has significantly altered the composition of juries in Middlesex County. One issue which has been raised is whether this system affects the disposition of litigation. Some members of the bar have expressed concern that inexperienced jurors tend to be defense oriented in criminal trials, and plaintiff oriented in civil litigation.

Whether the Middlesex system results in different verdicts should not be an issue. Adoption of a jury selection process should not be made on the basis that verdicts will be favorable towards one side or another. The ultimate goal is to select a jury which is fair and impartial. The real issue, therefore, is whether the selected jurors are truly representative of the population.

Empirical evidence demonstrates that there is no significant difference in jury verdicts in Middlesex County under the new system. Statistics for criminal litigation were compiled by the District Attorney for Middlesex County. In 1978, 61% of the criminal cases tried before a jury resulted in a guilty verdict. In the first year of the Middlesex system, 1979, this figure increased to 62%. During the first ten months of 1980, guilty verdicts decreased to 55%.

The data tends to indicate that "inexperienced" jurors are not necessarily defense oriented. If they were, then guilty verdicts from juries during 1979 should not have increased. Moreover, if juries behave differently in Middlesex County, then there should have been a greater fluctuation in guilty verdicts between 1978-1979 than between 1979-1980.

Even if there is such fluctuation, that does not necessarily signify that juries have made incorrect decisions. In fact, there is reason to believe that jury deliberations have improved since adoption of the new selection system. The issue, therefore, is not whether the verdicts are different, but whether the quality of the decisions has improved.

Measuring "quality" is an extremely difficult, but not impossible task. American jurisprudence has adopted many rules which insure a fair and impartial trial. For example, the rules of evidence safeguard against the introduction of irrelevant, immaterial and untrustworthy evidence. Judicial instructions focus on the jury's attention on the relevant issues. These rules

are designed to guarantee impartiality. One measure, therefore, of a "quality" decision may be the degree to which these rules are followed during jury deliberations.

Empirical research on juror behavior seems to indicate that jurors of higher socio-economic status tend to be the most influential during jury deliberations.¹¹ The reason behind this conclusion is that individuals of higher socio-economic backgrounds contribute more during these deliberations than those of lower socio-economic status.¹² Research has also found that more highly educated jurors tend to put greater emphasis on procedure and judicial instructions than jurors with less education.¹³ Generally, empirical research supports these conclusions.¹⁴

Elimination of occupational exemptions increases the probability that individuals with higher socio-economic backgrounds and increased education will serve as jurors. The Middlesex system allows doctors, lawyers, teachers, college students, professors, business executives, etc. . . . to participate in the jury process. As a result, the average level of education of the juries should increase. If the empirical evidence is correct, one would expect to find that juries in Middlesex County will tend to adhere to judicial instructions and procedures more often than juries selected under Chapter 234. There are two reasons for this conclusion. First, jurors with strong educational backgrounds will adhere to judicial instructions. Second, these individuals may be able to influence less educated jurors. While there is no direct relation between education and the ability to influence other jurors, there may be a relation between education and high socio-economic status. It is safe to assume, therefore, that individuals with high socio-economic backgrounds will also give greater weight to procedural and judicial instructions. fore, that individuals with high socio-economic backgrounds will also give greater weight to procedural matters and judicial

¹¹ Strodbeck, James & Hawkins, *Social Status in Jury Deliberations*, 22 Am. Soc. Rev. 713, 718 (1957).

¹² *Id.*

¹³ Simon, *Status and Competence of Jurors*, 64 Am. Jour. Soc. 563, 570 (1959).

¹⁴ See Gerbasi, Zuckerman & Reis, *Justice Needs A New Blindfold: A Review of Mock Jury Research*, 84 Psych. Bull. 323 (1977), but see Mills & Bohannon, *Juror Characteristics: To What Extent Are They Related To Jury Verdicts*, 64 Judicature 23 (1980).

instructions. Since these individuals tend to be the most influential during deliberations, they may be able to persuade less educated jurors to follow judicial instructions. As a result, juries selected in Middlesex County may tend to place great emphasis on those procedures which insure the fairness of a trial. In this respect, the "quality" of jury decision may be said to improve under the Middlesex system.

Unfortunately, there is no empirical evidence from Middlesex County which supports this position. Those involved with the system have stated that civil damage awards have increased. At the same time, however, juries are less likely to find a defendant liable. This is consistent with the empirical research. Jurors have become more sophisticated, and are examining the issue of liability closely. Once liability is determined, however, jurors with higher socio-economic backgrounds may be more realistic in evaluating damages.

B. EXPANSION OF THE MIDDLESEX SYSTEM TO ALL COUNTIES IN THE COMMONWEALTH

Legislation designed to expand the Middlesex system to all counties in the Commonwealth failed to pass during the 1980 legislative session. Originally filed as Senate No. 838, the bill was redrafted by the Senate Committee on Ways and Means and renumbered as Senate No. 2232.

Several bills have been filed in the 1981 legislative session. Senate No. 1770 of 1981 is a refile of Senate No. 2232 and contains no new provisions. In fact, most of the 1981 proposals are either refiles of Senate No. 2232 or take the provisions of the bill and apply them to a specific county. A new version of the jury bill, House No. 5816, has also been submitted. This bill has been filed with the understanding that several minor amendments, suggested by the Jury Management Advisory Committee for Middlesex County, would be made during the legislative process.

1. Outline of the System and Legislative Development

The jury system envisioned by these legislative proposals closely resembles the system currently employed in Middlesex County. In this respect, all the legislative proposals are sub-

stantially the same. There are, however, some significant differences between the various pieces of legislation.

The following analysis is based on the most recent version of the jury bill House No. 5816 of 1981. Differences between this bill, Senate No. 838 of 1980, Senate No. 2232 of 1980 and Senate No. 1770 of 1981 will be noted at the end of each section.

a. Implementation of the New Jury System

House No. 5816 would repeal G.L. Chapter 234A in its entirety as of January 1, 1982. A new Chapter 234A would be inserted in its place. Accordingly, House No. 5816 does not immediately affect those counties currently selecting jurors under G.L. Chapter 234. Only Middlesex County would be affected upon passage of the bill, resulting in minor changes from current practices.

House No. 5816 authorizes the Supreme Judicial Court to designate, by court rule, those counties which will participate in the new jury system. The bill does not establish a date on which the entire Commonwealth will adopt new jury selection procedures. The phase in of the new system is left to the discretion of the Court.

The Supreme Judicial Court need not implement the new system according to existing county boundaries. Section 3 of the new Chapter 234A, as embodied in House No. 5816, authorizes the Court to divide the Commonwealth into juror districts. Each district is a geographical area encompassing a designated list of cities and towns. These districts may or may not be drawn according to present county boundaries. As a result, each juror district may contain one or more courthouses. It is also possible that a city or town may be located in one or more juror districts.

Legislative Development

The concept of a "juror district" is unique to House No. 5816. All the other legislative proposals used the term "judicial district." By defining a juror district as a "list of cities", the Court is provided with a flexible approach to juror selection. This new concept allows for a consideration of demographic variations and juror convenience in the establishment of juror districts. Strict application of present county boundaries would inhibit these considerations.

b. Juror Qualifications and Exemptions from Service

House No. 5816 of 1981 eliminates the numerous occupational exemptions currently recognized by G.L. Chapter 234. Any person qualified to vote for members of the General Court is eligible to serve, regardless of voter registration. Section 6 of the new Chapter 234A, as established by House No. 5816 of 1981, exempts an individual where:

1. Such person is under the age of eighteen years.
2. Such person is seventy years of age or older and indicates on the juror confirmation form an election not to perform juror service.
3. Such person is not able to speak and understand the English language.
4. Such person is incapable, by reason of a physical or mental disability, of rendering satisfactory juror service. Any person claiming this disqualification must submit a letter from a registered physician stating the nature of the disability and the physician's opinion that such disability prevents the person from rendering satisfactory juror service. In reaching a medical conclusion, the physician shall apply the following guideline. A person shall be qualified to perform juror service if he is capable of performing a sedentary and attentive job for six hours per day, with short workbreaks in the morning and afternoon sessions, for three consecutive business days. Moderate hypertension or anxiety without further complications shall not be sufficient for disqualification under this Section.
5. Such person is solely responsible for the daily care of a permanently disabled person living in the same household where performance of juror service would cause a substantial risk of injury to the health of the disabled person. Any person claiming this disqualification must submit a letter from a registered physician stating the name, address, and age of the disabled person, the nature of the daily care provided by the prospective juror, and the physician's opinion that performance of juror service would cause a substantial risk of injury to the health of the disabled person. Any person who is regularly employed at a location other than that of his household shall not be entitled to this disqualification.
6. Such person is outside the juror district and does not intend to return to the juror district at any time during the following year.
7. Such person has been convicted of any felony within seven years or is a defendant in any pending felony case or is in the custody of any correctional institution.

8. Such person has served as a grand or trial juror in any state or federal court within the current year or previous three calendar years or the person is currently scheduled to perform such service. Any person claiming this disqualification must submit a letter or certificate from the appropriate clerk of court or jury commissioner verifying such prior or pending juror service unless such service was performed or is pending in a state court of this Commonwealth.

Legislative Development

There have been several changes in the statutory language of these exemptions. Under Senate No. 838 of 1980, individuals were subject to serve on juries if they were domiciled in a "judicial district or resided within a judicial district more than fifty percent of the time with or without domiciliary intent." The domicile requirement was omitted when the bill was re-drafted, Senate No. 2232 of 1980. House No. 5816 of 1981 and Senate No. 1770 of 1981 contained no reference to domicile. Under House No. 5816, an individual who resides in a juror district for more than fifty percent of the time is eligible for service in that district.

Elimination of the domicile requirement presents a novel approach to jury eligibility. Since the obligation to serve is based on residency, a citizen of another state may be required to sit on a jury in Massachusetts. The policy behind House No. 5816 of 1981 is that one who resides in a community should be considered a member of that community for the purposes of jury duty. Accordingly, the benefits derived from residency justify the imposition of jury obligations.

House No. 5816 of 1981 establishes specific criteria for determining whether a juror is medically able to serve. Senate No. 838 of 1980, Senate No. 2232 of 1980 and Senate No. 1770 do not establish medical guidelines.

Moderate hypertension and anxiety, without further complications, are insufficient to disqualify a person from jury duty under the medical exemption contained in House No. 5816. The Jury Management Advisory Committee for Middlesex County has suggested that this language be deleted from the bill. The Committee felt that this language constitutes a medical judgement. As a result, this language has been omitted from the amended version of House No. 5816.

House No. 5816 of 1981 provides an exemption for individuals taking care of disabled persons. This provision is designed

to alleviate the hardships for those people who have the responsibility of caring for a disabled person in their own home. This provision does not appear in Senate No. 838 of 1980, Senate No. 2232 of 1980 or in Senate No. 1770 of 1981.

c. Administration of the New Jury System

Sections 7-10 of the new Chapter 234A, as embodied in House No. 5816 of 1981, establish the two agencies that are responsible for administering the new system. The Office of Jury Commissioner is responsible for the day to day operations and implementation of the system. The office is located in the judicial branch, under the control of the Supreme Judicial Court, and consists of a jury commissioner, four deputy commissioners and necessary staffing. The Supreme Judicial Court appoints the jury commissioner for a five year term. The commissioner appoints the deputy commissioner and staff, subject to the approval of the Jury Management Advisory Committee, for a five year term. Salaries are established pursuant to the classification plan applicable to employees of the Supreme Judicial Court.

A Jury Management Advisory Committee is established as a standing committee to the Supreme Judicial Court. Composed of a chairperson and five members, the committee is responsible for direct supervision over the Office of Jury Commissioner. In addition, the committee is required to assist the Supreme Judicial Court in supervising the jury commissioner and in fostering research on all aspects of the jury system. Members of the committee are appointed by the chief justice of the Supreme Judicial Court from among the justices of any trial or appellate court in the Commonwealth, both state and federal. The Supreme Judicial Court and the Office of Jury Commissioner have the authority to promulgate rules and regulations not inconsistent with the act. Rules established by the jury commissioner are subject to the approval of the Supreme Judicial Court.

Legislative Development

Senate No. 838 of 1980, provided for three deputy commissioners. This was increased to four deputy commissioners in the 1980 redraft, Senate No. 2232. House No. 5816 also provides for four deputy commissioners.

Specific statutory salaries were established under Senate No.

838 of 1980. The jury commissioner was to receive 90% of a trial justice's salary and a deputy commissioner 75% of a trial judge's salary. These provisions were eliminated in Senate No. 2232 of 1980 and in the 1981 proposals, Senate No. 1770 and House No. 5816. Instead, salaries for the commissioner and deputy commissioner will be determined by the state classification plan.

d. Selection Procedures

Sections 12-19 of the new Chapter 234A, as provided in House No. 5816 of 1981, establish juror selection procedures. These procedures utilize random selection in securing the services of potential jurors.

The process begins with the cities and towns. On or before the first of June of each year, they are required to prepare a list of all inhabitants over seventeen years of age who resided in the locality as of the first of January. Each person on the list receives a number. This list is called the Numbered Resident List and must be submitted to the jury commissioner by the above mentioned date.

Localities with a population of twenty thousand or more are also required to submit a Numbered Resident File to the jury commissioner by the first of June. A Numbered Resident File is merely an automated Numbered Resident List. The file is used for data processing. This requirement is optional for localities with a population of less than twenty thousand. Cities and towns that submit automated files will have fulfilled their responsibilities under the new system.

On or before the first of July, the jury commissioner is required to determine the number of prospective jurors to be drawn from each locality. The number of jurors to be selected is determined by the following calculation:

$$\begin{array}{lcl} \text{Number of Jurors} & & \\ \text{to be Selected} & & \\ \text{from each} & \text{Population of Locality} & \text{Number of Prospective} \\ \text{Locality} & = \frac{\text{Population of the}}{\text{Juror District}} \times \text{Jurors Required for} \\ & & \text{the Juror District} \end{array}$$

Population figures for this calculation are taken from the Numbered Resident Lists for each locality. The jury commissioner estimates the number of jurors that each juror district will require for the next term. This procedure insures that each locality is proportionately represented on juries in a juror district.

The jury commissioner is required to select prospective jurors by the first day of July. The procedure begins by generating a sequence of random numbers for each locality. The sequence is equal to the total number of prospective jurors to be drawn from each locality. Selection takes place by matching the numbers in the sequence with the numbers on a locality's Numbered Resident List or File.

On or before the first day of August, each city or town that has not submitted a Numbered Resident File must submit to the jury commissioner a typewritten list of randomly selected jurors from that locality. These lists are typed on special forms that are suitable for data processing. The jury commissioner supplies the forms.

Once this information is obtained, the jury commissioner prepares a Prospective Juror List for each city and town. The lists must be completed by the first of September. The Prospective Juror Lists are sent to each locality by the first of October.

The jury commissioner also compiles a Master Jury List by the first day of October. This list is an aggregate of all the Prospective Juror Lists for each juror district. The Master Juror Lists are randomly shuffled. After randomization, jurors from each district are summoned in sequence from the Master juror List.

Twelve weeks prior to the commencement of the term of any grand or trial jury, the clerk of each court is required to send letters of venire to the jury commissioner.

Legislative Development

Under House No. 5816 of 1981, random procedures are completed by the first day of October of each year. The 1980 proposals, Senate No. 838 and Senate No. 2232, would have required that these procedures be finished by the first of November of each year. Senate No. 1770 of 1981 also establishes a November time limit for random procedures.

e. Summoning Procedures

Section 21 of the new Chapter 234A, as established in House No. 5816 of 1980, requires the commissioner to summon jurors at least twelve weeks prior to the commencement of service. Summonses are delivered by first class mail. The summons states the time, date, location of service, the right to postpone or transfer location and a penalty provision for failure to obey the summons.

A juror confirmation form is enclosed with the summons. The selected juror certifies, on the form, whether or not he is qualified to serve. The statutory requirements for eligibility are printed on the form. Any juror desiring to postpone service or change the location of service must state this request on the confirmation form. A completed form must be mailed by the juror to the jury commissioner within ten days of receipt. If the confirmation form is lost or if there is insufficient time to return it by mail, a juror may confirm his status orally by telephone or in person.

A juror questionnaire is also enclosed with the summons. This questionnaire elicits demographic data. The information is used by the court for conducting voir dire examinations. These questionnaires are confidential. Only the trial judge and the clerk retain copies after a voir dire. All others are destroyed. Jurors are required to bring the questionnaires to court on their first day of service.

A second summons will be issued to those jurors who have failed to return a completed juror confirmation form by the eighth week preceding commencement of service. Jurors are given five days to answer the second summons.

Where a shortage of jurors appears, the jury commissioner is empowered to issue a supplementary summons. This summons will be issued on or before the sixth week preceding the commencement of any trial or grand jury. A juror is given ten days to respond. A second supplementary summons will be issued to those jurors who have not responded by three weeks prior to the time when service is to begin. Jurors are given five days to respond to a second supplementary summons.

The jury commissioner may also issue a forthwith summons. Under this procedure, the commissioner is empowered to summon additional jurors to appear immediately. Notice may be made by any available means, including telephone. The jury commissioner has the power to deny the right of postponement or change of location to jurors under this procedure.

Legislative Development

Senate No. 838 of 1980, Senate No. 2232 of 1980, and Senate No. 1770 of 1981 contain specific deadlines for responding to the various summonses. House No. 5816 of 1981 revises this procedure and establishes a weekly schedule for issuing and responding to summonses.

The new weekly schedule is designed to provide a more flexible system. It takes into account the delays associated with mailing summonses to localities in the western part of the state.

The 1980 legislation, Senate No. 838 and Senate No. 2232, did not provide for the issuance of a second supplementary summons. This provision has also been omitted from Senate No. 1770 of 1981.

A third difference concerns the juror confirmation form. House No. 5816 of 1981 includes language which allows for oral confirmation. None of the other proposals contain such a provision.

f. Juror Utilization and Management

Section 36 of the new Chapter 234A, as established in House No. 5816 of 1981, gives jurors a statutory right to postpone service for up to one year. The jury commissioner may also authorize a transfer in the location of service within a particular juror district, under section 37 of the new Chapter. In order to obtain a transfer, a juror must demonstrate that hardship would result if he was required to serve at the location originally assigned. The jury commissioner is also given the authority, under section 31 of the new Chapter 234A, to modify the date, location or other condition of service in order to meet the urgent needs of the court.

Where it appears that the number of jurors summoned exceeds judicial requirements, the jury commissioner, pursuant to section 30 of the new Chapter 234A, has the authority to cancel grand or trial juror service. While a cancelled juror would not be required to serve, he will not be disqualified from service if selected within three years.

The jury commissioner is authorized, by section 32 of the new Chapter 234A, to impose a standby status condition on any trial or grand juror. A standby juror must be prepared to serve on each day of his assigned term. While on standby status, a juror is required to telephone the court house after 3:00 p.m. on the business day preceding his term of service. He will be informed at that time whether he will be required to appear in court the next day.

The jury commissioner and the courts may defer or advance the term of any grand or trial juror. Deferments or advancements are granted only upon a showing of hardship, inconvenience or public necessity.

A court is given the authority to excuse a juror from service, under section 41 of the new Chapter 234A, as established in House No. 5816 of 1981. Several different standards are established. Grand jurors may be excused upon a showing of hardship, inconvenience or public necessity. A stricter test is applied to trial jurors. They will only be excused upon a showing of extreme hardship. After a trial juror has been impanelled, the court may excuse or dismiss the juror only after a hearing and upon a finding of extreme hardship. Once deliberations have begun, a trial juror may be excused only upon the finding of an emergency or other compelling reason.

Notwithstanding the fact that a juror has been summoned as a trial or grand juror, the court has the authority, under section 41 of the new Chapter 234A, to require a juror to serve in either capacity. The court may also change the location or date of service. The court has the authority to dismiss a juror if the interests of justice will be served thereby.

Section 71 of the new Chapter 234A, as embodied in House No. 5816 of 1981, establishes procedures for the selection of alternate jurors. In every twelve person jury case, a minimum of two additional jurors must be impanelled. At least one additional juror is impanelled in six person jury trials. All jurors are chosen, by random drawing, prior to jury deliberations. Alternate jurors may be kept separate from the jury during deliberations or may be present during these proceedings. They may not, however, communicate with jurors or participate in any manner. If a juror is discharged, an alternate juror is chosen to take his place and deliberations begin anew. Alternate jurors may be permitted to leave the courthouse provided they are on telephone standby notice. The selection of alternate jurors is not required where the court grants a motion for a directed verdict.

Legislative Development

Senate No. 838 of 1980 allowed the jury commissioner to modify the date, location and conditions of service "as long as no unusual hardship is imposed on the juror thereby." Similar language appeared in Senate No. 838 of 1980 concerning standby jurors. This language does not appear in House No. 5816 of 1981. The jury commissioner now has complete discretion to act in situations where there is a shortage of jurors.

Senate No. 2232 of 1980 and Senate No. 1770 of 1981 require

that alternate jurors be kept separate from the jury during deliberations, but are not allowed to leave the courthouse. As a result, these jurors must wait until a verdict is reached before being released from duty. House No. 5816 of 1981 changes these procedures, thereby reducing the frustration associated with alternate juror status.

g. Juror Compensation

Compensation under the new system attempts to put jurors in the same position as they would have been had they not served. The compensation scheme is outlined in sections 50-62 of the new Chapter 234, as established in House No. 5816 of 1981.

Grand and trial jurors are paid by their employers for the first three days of service. Each juror receives his regular wages during these three days. Wages are determined by custom or practice during the three months prior to service. Self-employed jurors are on their own.

Employers or those self-employed may be excused from payment upon a showing of extreme financial hardship. A hearing is conducted on this issue no later than twenty days after the juror has presented his certificate of service to his employer. If an employer is so excused, the court will award reasonable compensation in lieu of wages, but not in excess of \$50.00 per day for the first three days of service.

The state assumes the burden of compensating trial jurors beginning on the fourth day of service and thereafter at a rate of \$50.00 per day. Trial jurors are not entitled to receive out of the pocket expenses. Grand jurors receive cumulatively from the state and their employer the greater of the following two rates: \$50.00 per day or an amount not in excess of their regular daily wages plus travel expenses in excess of those ordinarily incurred. In any event, the state's contribution to this amount cannot exceed \$50.00 per day. A hearing is held on the first day of a grand juror's service in order to determine the compensation rate. Payment is based on a confidential questionnaire completed by each grand juror.

Unemployed grand or trial jurors are entitled to receive reasonable out of the pocket expenses for the first three days of service. Payment may not exceed \$50.00 per day. Jurors receiving unemployment compensation will not lose their benefits on account of their juror service.

In order to receive compensation, grand or trial jurors must appear in court. Jurors on standby or telephone notice are entitled to receive only reasonable expenses related to the imposition of such status. Alternate jurors receive the same compensation as jurors who actually serve. Upon a finding that a juror may not reasonably resume employment during a holiday, adjournment, or because of cancellation of service, such juror may be credited with a day of service and/or receive compensation.

Section 59 of the new Chapter 234A, as embodied in House No. 5816, provides for special awards. The court may reimburse jurors for out of the pocket expenses resulting from personal injury or property loss upon a showing that the Commonwealth is liable or that the award would serve the best interests of justice. The court also pays the expenses associated with sequestered jurors. The court or the jury commissioner is also responsible for making arrangements for elderly and handicapped jurors.

Except for special awards, the Office of Jury Commissioner compensates jurors on a weekly basis. The comptroller will establish a separate account for this purpose. Checks are mailed on a weekly basis from the comptroller directly to jurors. Disbursements for special awards are issued by the clerk of courts.

Legislative Development

The special awards language for personal injury and property loss is unique to House No. 5816 of 1981. Neither Senate No. 838 of 1980, Senate No. 2232 of 1980 nor Senate No. 1770 of 1981 contain such a provision.

House No. 5816 of 1981 requires that an employer's compensation for the first three days of service be calculated from a three month period preceding the beginning of service. All other legislative proposals base this calculation on a six month period. In addition, House No. 5816 calls for a compensation hearing no later than twenty days after tender of a service certificate to an employer. The 1980 legislation, Senate No. 838 and Senate No. 2232, allowed up to thirty days in which to hold the hearing. Senate No. 1770 of 1981 also provides for a thirty day hearing period.

h. Penalties and Enforcement

The new Chapter 234A, as embodied in House No. 5816 of 1981, contains several enforcement provisions. Penalties exist for failure to fulfill juror duties, failure to meet an employer's obligation to compensate employees and jury tampering.

Pursuant to section 44 of the new Chapter 234A, jurors who fail to perform any condition of their service may be subject to a criminal fine of not more than \$2,000. This penalty also applies to wilfull misrepresentations on the juror confidential questionnaire.

Two procedures are established for jurors who fail to meet their responsibilities. The jury commissioner may, under section 46 of the new Chapter 234A, deliver a delinquency notice. The notice merely informs the juror of his or her status and requires him or her to contact the jury commissioner no later than twenty days after receipt. The jury commissioner may prepare, pursuant to section 47 of the new Chapter 234A, an application for the issuance of a criminal complaint against jurors not responding to the notice thirty days after receipt thereof. Applications are sent to the district court having jurisdiction over the juror. The Office of Jury Commissioner will be represented by legal counsel in all proceedings arising out of any application for the issuance of a criminal complaint.

Upon a finding that a juror has not appeared to perform or complete his service, the court may issue a warrant for his arrest. Local police may be required to personally visit the juror for the purpose of warning him or her that failure to meet jury obligations may result in his or her arrest. The court is empowered to hold a juror in criminal contempt.

Employers failing to compensate jurors become liable to their juror-employees in an action of tort under section 63 of the new Chapter 234A. Jurors may commence a civil action in district court upon the expiration of thirty days after tender of their juror service certificate. This section also provides for treble damages and reasonable attorney's fees upon a finding of wilfull conduct by the employer. Failure to compensate an employee also subjects the employer to the criminal sanctions of section 64 of the new Chapter 234A.

Employers who harass, threaten, or in any way impede their employees from performing jury duty, are liable to their employees in tort actions. Section 64 of the new Chapter 234A

provides for treble damages and reasonable attorney fees upon a finding of wilfull conduct by the employer. A juror under this section may commence an action in Superior Court for damages and injunctive relief. This section specifically proscribes the imposition of compulsory work assignments and any intentional acts which substantially interfere with the availability, effectiveness, attentiveness or peace of mind of the employee during the performance of his service.

Section 64 of the new Chapter 234A also establishes criminal penalties. Any employer who violates this section may, upon conviction, be subject to a fine of not more than \$5,000. The Office of Jury Commissioner may file an application for the issuance of a criminal complaint against an employer who violates this section.

Anyone guilty of fraud in the processing and selection of jurors may be punished by a fine of not more than \$2,000 under section 74 of the new Chapter. This section does not limit the application of any other provisions of law concerning the crime of jury tampering.

Legislative Development

Under Senate No. 838 of 1980, jurors who failed to fulfill their responsibilities could be held in criminal contempt and subject to a \$2,000.00 fine. A warrant for their arrest would be issued for failure to appear before the court. This procedure was altered when the bill was redrafted. Senate No. 2232 of 1980 and Senate No. 1770 of 1981 provide for the issuance of a warrant for the arrest of a delinquent juror. House No. 5816 of 1981 retains the warrant provision and establishes a procedure whereby local police would personally visit an irresponsible juror. The rationale behind the warrant procedure is that it provides a more efficient enforcement mechanism than the criminal contempt process.

All the legislative proposals contain provisions for the issuance of a delinquency notice. House No. 5816 of 1981, however, includes a twenty day time limit in which to respond. Also, failure to respond may result in the issuance of a criminal complaint.

There has been a significant change in the enforcement provisions relating to employers. Senate No. 838 of 1980, Senate No. 2232 of 1980 and Senate No. 1770 of 1981 create a civil cause of action against an employer for either harassment or

the failure to pay wages. Under House No. 5816 of 1981, however, the failure to compensate an employee for the first three days of service constitutes harassment. An employer who fails to compensate his employees is now subject to civil liability under both section 63 and section 64 of the new Chapter 234A.

Criminal sanctions are strengthened in House No. 5816 of 1981. Senate No. 838 of 1980, Senate No. 2232 of 1980 and Senate No. 1770 of 1981 contain no criminal sanctions for failing to compensate a juror. House No. 5816 expressly provides for the issuance of a criminal complaint against an employer who fails to compensate his employees.

Elimination of criminal contempt procedures makes enforcement more efficient. Application of the criminal sanctions to compensation disputes provides a deterrent against those employers who would not pay their employees for the first three days of jury duty. Employees are unlikely to commence civil proceedings against their employers for fear of losing their jobs. In addition, the costs of litigation may outweigh any possible recovery. Absent criminal sanctions, there is no real compulsion for an employer to comply with the provisions of the legislation.

House No. 5816 of 1981 reduces the penalty for jury tampering. Under Senate No. 838 and Senate No. 2232 of 1980, anyone found guilty of fraudulently selecting or processing jurors was subject to a \$10,000.00 fine or two years imprisonment. Senate No. 1770 of 1981 also contains these strict penalties for jury tampering.

i. Challenge to Jury Pools

Section 76 of the new Chapter 234A, as proposed by House No. 5816 of 1981, allows a party to challenge the composition of a jury pool. A party seeking to challenge must file a motion for appropriate relief. All challenges must be in writing, supported by an affidavit and specify facts and demographic data constituting the grounds of the challenge.

This section also restricts challenges to jury pools. A party may challenge a jury only on the grounds that it did not represent a fair cross section of the judicial district from which it was drawn. If the challenge is upheld, a court is required to discharge the entire jury pool.

Irregularities in selecting and processing jurors will not result in a mistrial or the setting aside of a verdict unless a timely ob-

jection is made. A party must object as soon as possible after an irregularity is discovered or after it should have been discovered. In addition, an objecting party must demonstrate that he has been specifically injured or prejudiced by the irregularity.

Legislative Development

The first draft of the legislation, Senate No. 838 of 1980, would have abolished pre-emptory challenges. This language was omitted when the statute was redrafted and does not appear in House No. 5816 or Senate No. 1770 of 1981.

The Jury Management Advisory Committee for Middlesex County has suggested several amendments to House No. 5816 of 1981. The Committee would delete those provisions which restrict jury pool challenges to the issue of whether a fair cross section has been drawn. Also, the Committee would delete the provision which requires a judge to discharge the entire jury pool. As a result, these provisions will not appear in the amended version of House No. 5816.

2. Comparision with G.L. Chapter 234A

House No. 5816 of 1981 incorporates many of the administrative regulations promulgated by the Office of Jury Commissioner for Middlesex County. In this respect, the new legislation is a description of the policies currently employed in Middlesex County. As a result, House No. 5816 is more detailed than G.L. Chapter 234A.

There are some noteworthy differences between the statutory requirements of G.L. Chapter 234A and House No. 5816 of 1981. These distinctions, however, do not substantially alter the system as currently used in Middlesex County.

The most significant difference concerns the length of time allowed for postponing juror service. Under G.L. Chapter 234A, a juror is entitled to postpone service for up to ten months. This period is lengthened to one year under House No. 5816 of 1981.

House No. 5816 increases the rate for juror compensation. Section 37 of Chapter 234A requires the county to pay each juror \$40.00 per day after the first three days of service. House No. 5816 would compensate jurors at a rate of \$50.00 per day.

The compensation provisions in House No. 5816 of 1981 are more detailed than G.L. Chapter 234A, §37. Section 37 requires that each grand juror be compensated by the county,

even where the grand juror is compensated by his employer. As a result, many grand jurors in Middlesex County receive double compensation for their service. House No. 5816 of 1981 corrects this problem.

The payment procedures currently employed in Middlesex County require the clerk of courts to issue all compensation checks. This procedure is extremely burdensome. Under House No. 5816 of 1981, checks for juror compensation will be mailed directly from a special account and paid by the comptroller.

House No. 5816 of 1981 decreases the number of alternate jurors used during a trial. Section 44 of Chapter 234A requires that sixteen jurors be impanelled in every civil or criminal case to be tried with a jury of twelve lasting more than twenty days. Fourteen jurors are required to be impanelled in jury of twelve cases lasting between five to twenty days. Thirteen jurors are required to be impanelled in all other cases. House No. 5816 of 1981 requires that fourteen jurors be impanelled in all twelve person jury cases.

Eight jurors are required to be impanelled in six person jury cases expected to last more than five days under G.L. Chapter 234A. Seven jurors are required to be impanelled in all other six person jury cases under this Chapter. House No. 5816 of 1981 requires that seven jurors be impanelled in six person jury cases regardless of their duration.

Alternate jurors in Middlesex County are not allowed to be present during jury deliberations. Under House No. 5816 of 1981, alternate jurors, may, at the courts discretion, be present during these proceedings. Also, alternate jurors are allowed to leave the court under the new legislation. This appears to be a more efficient system. Jurors in Middlesex County must wait until the jury has reached a verdict before they can be dismissed. The new system is more convenient for alternate jurors and reduces the frustration associated with waiting while the jury renders a verdict.

A final difference concerns the method of selection. G.L. Chapter 234A requires that localities with a population of 25,000 or more submit an automated Prospective Juror List to the jury commissioner. House No. 5816 of 1981 requires that localities with a population of 20,000 or more submit an automated Number Resident File. Once submitted, the locality is relieved of its duties. The new system, therefore, requires automation at an earlier stage of the selection process. Cities sub-

mitting an automated Resident File are not required to select prospective jurors. This procedure makes the system more efficient.

3. Evaluation of Expanding the Middlesex County System

The system envisioned by House No. 5816 of 1981 is substantially the same as the jury system in Middlesex County. There is reason to believe, therefore, that benefits associated with the Middlesex system will accrue to the Commonwealth.

Elimination of class and occupational exemptions will enhance the representativeness of jury pools. Randomized selection will insure that selected jurors represent a fair cross section of the population. Removing juror selection from the local boards will also prevent many of the abuses existing under G.L. Chapter 234.

A one day or one trial procedure will provide additional advantages to the Commonwealth. The costs of juror compensation will decrease. Judges will have to spend less time hearing petitions from jurors. Cities and towns will be relieved of the administrative burdens associated with selecting jurors.

One issue which has been raised concerns the efficiency of the system in areas of the Commonwealth with different population densities. Computerized selection resolves these problems. As long as the computer has the processing capacity, population density will not affect the system. Also, mailing summonses will decrease costs in sparsely populated areas of the state.

The most important issue to be addressed during expansion of the system is defining juror districts. The Supreme Judicial Court may implement the system on a county by county basis. House No. 5816, however, gives the Court the authority to establish and define juror districts that are different from present county boundaries.

It may be desirable to have each juror district reflect the demographic make up of the entire state. Such a policy would require a close examination of each locality with respect to its racial, ethnic and economic characteristics. In order to provide a "balance" within each district, localities with different characteristics would have to be combined. Unfortunately, cities and towns with varying demographic characteristics do not always share common borders. As a result, a particular juror

district may include communities which are scattered throughout the Commonwealth.

An alternative to this approach would be to define juror districts according to present county boundaries or cities in geographical proximity to a courthouse. This approach ignores population variations. Jurors selected under this definition will accurately reflect the population of a juror district. The inhabitants of the district, however, may not be representative of the population of the entire state. As a result, jury pools will not be a fair and representative cross section of the entire state.

The fundamental question is whether a jury must reflect the population of the entire state or some other geographical unit. If the latter alternative is chosen, then there is less need to "balance" each juror district by including communities with different demographic characteristics. Even under this approach, juror districts should not be defined in such a way as to create jury pools which reflect only one segment of society.

The Supreme Judicial Court must also consider juror convenience. Juror districts that encompass large geographical areas may create transportation problems for jurors. The price of fuel and reductions in mass transportation may impose undue burdens on jurors who are required to travel great distances.

Juror districts containing more than one courthouse present additional problems. House No. 5816 allows jurors to transfer the location of service within their juror district. Courthouses in populated areas will be selected for transfers more often than courthouses in less populated areas. Excessive transfers, however, may distort the representativeness of juries at some courthouse locations. The jury commissioner will be forced to deny transfer requests in order to protect the integrity of the jury pools.

Defining juror districts is an extremely complex task. House No. 5816 gives the Supreme Judicial Court both the time and flexibility to properly implement the system. Prior experience in Middlesex County indicates that the system can be successful.

Fiscal limitations must also be considered. Expansion of the Middlesex jury system will require increased expenditures for the improvement of juror facilities at some courthouse locations. These expenditures, however, can be spread out during the phase in period of the new system, thereby reducing any ad-

verse economic ramifications. The costs of administering the new jury system may increase. Administrative costs, however, will not increase proportionately with expansion. It has been estimated that operating costs would increase approximately 50% if the jurisdiction of the Office of Jury Commissioner for Middlesex County was doubled.

Initial expenditures for the improvement of juror facilities and increased administrative costs will be offset by significant decreases in the cost of juror compensation. In the long run, expansion of the Middlesex jury system will result in a net savings to the Commonwealth.

C. RECOMMENDATIONS

The juror selection procedures established by G.L. Chapter 234 do not insure that jury pools will adequately reflect the population of a community. Moreover, this Chapter imposes unnecessary burdens on citizens who perform jury service. It is clear that the General Court should consider alternative approaches to jury selection in the Commonwealth.

Expansion of the Middlesex County system is one alternative to G.L. Chapter 234. We would advise, however, against hastily drafted legislation or policies which attempt to provide a "quick fix" to the complex problems of jury selection.

It is possible that minor amendments to G.L. Chapter 234 would enhance the representativeness of jury pools. Altering selection procedures under this Chapter, however, would not produce all the benefits which can be obtained by expanding the Middlesex system. These advantages can never be realized unless G.L. Chapter 234 is completely revised.

The new Chapter 234A, as embodied in House No. 5816 of 1981, is based on the experience obtained from operating the system in Middlesex County. The bill, therefore, does not establish a new jury system. House No. 5816 of 1981 merely expands a system which is already operating successfully. Expansion of this system is preferable to the adoption of new procedures that have not been tested.

The Judicial Council recommends that the Middlesex jury system, as embodied in House No. 5816 of 1981, be expanded to all counties in the Commonwealth. We also recommend that the amendments suggested by the Jury Management Advisory Committee for Middlesex County be incorporated into the final version of House No. 5816 of 1981.

Section 3. Juror Districts. The juror districts of the Commonwealth for purposes of this Chapter shall be the counties unless modified by the Supreme Judicial Court. The Supreme Judicial Court may by rule of court define juror districts for purposes of this Chapter which differ in geographical area and population from the counties in accordance with the following principles. A juror dis-

trict shall be the geographical area encompassing a designated list of cities and towns of this Commonwealth. A juror district may be defined for or associated with a single court or court location, or it may be defined for or associated with several courts or court locations. Every citizen of the Commonwealth shall have the opportunity to serve as a grand and trial juror in at least one juror district. There shall be no proscription against citizens of certain cities and towns being eligible or subject to perform grand or trial juror service in more than one juror district.

Section 4. Elimination of Class Exemptions. Juror Service shall be a privilege and a solemn duty which every person who qualifies under this chapter must perform. All persons selected for juror service on grand or trial juries shall be selected from fair and randomly drawn cross-sections of the population of the juror district. All persons who are eighteen years of age or older shall have equal opportunity to be considered for juror service. No person shall be permitted to volunteer for juror service. All persons shall be legally obligated to serve as jurors when selected and summoned for that purpose. No person, eighteen years of age or older, shall be exempted or excluded from serving as a grand or trial juror because of race, color, religion, sex, national origin, economic status, or occupation. Physically handicapped persons may serve where the court finds such service is feasible. The court shall strictly enforce the provisions of this Section.

Section 5. Masculine Pronouns. Masculine pronouns are used throughout this Chapter for simplicity. When these pronouns are used, they are intended to include both genders.

Section 6. Qualifications for Juror Service. As of the date of receipt of the juror summons, any citizen of the United States who is a resident of the juror district or who lives within the juror district more than fifty percent of the time, whether or not he is registered to vote in any state or federal election, shall be qualified to serve as a grand or trial juror in such juror district unless one of the following grounds for disqualification applies.

1. Such person is under the age of eighteen years.

2. Such person is seventy years of age or older and indicates on the juror confirmation form an election not to perform juror service.

3. Such person is not able to speak and understand the English Language.

4. Such person is incapable, by reason of a physical or mental disability, of rendering satisfactory juror service. Any person claiming this disqualification must submit a letter from a registered physician stating the nature of the disability and the physician's opinion that such disability prevents the person from rendering satisfactory juror service. In reaching a medical conclusion, the physician shall apply the following guideline. A person shall be qualified to perform juror service if he is capable of performing a sedentary and attentive job for six hours per day, with short work-breaks in the morning and afternoon sessions, for three consecutive business days. Moderate hypertension or anxiety without further complications shall not be sufficient for disqualification under this Section.

5. Such person is solely responsible for the daily care of a

permanently disabled person living in the same household where performance of juror service would cause a substantial risk of injury to the health of the disabled person. Any person claiming this disqualification must submit a letter from a registered physician stating the name, address, and age of the disabled person, the nature of the daily care provided by the prospective juror, and the physician's opinion that performance of juror service would cause a substantial risk of injury to the health of the disabled person. Any person who is regularly employed at a location other than that of his household shall not be entitled to this disqualification.

6. Such person is outside the juror district and does not intend to return to the juror district at any time during the following year.

7. Such person has been convicted of any felony within seven years or is a defendant in any pending felony case or is in the custody of any correctional institution.

8. Such person has served as a grand or trial juror in any state or federal court within the current year or previous three calendar years or the person is currently scheduled to perform such service. Any person claiming this disqualification must submit a letter or certificate from the appropriate clerk of court or jury commissioner verifying such prior or pending juror service unless such service was performed or is pending in a state court of this Commonwealth.

Section 7. Office of Jury Commissioner; Branch Offices. The Office of Jury Commissioner for Middlesex County, established under Chapter 415 of the Chapters and Resolves of 1977, shall be the Office of Jury Commissioner for the Commonwealth. This office shall have plenary authority to implement this Chapter in the participating counties. Hereafter in this Chapter, this office shall be referred to as the Office of Jury Commissioner. This office shall be within the judicial branch. It shall be a department of and under the supervision and control of the Supreme Judicial Court. The Office of Jury Commissioner, with the approval of the Supreme Judicial Court, may establish branch offices for the western and southern regions of the Commonwealth.

Section 8. Jury Management Advisory Committee. A Jury Management Advisory Committee, consisting of a chairperson and six members, shall be established as a standing committee of the Supreme Judicial Court. The chairperson and committee members shall be justices of any trial or appellate court of the Commonwealth or of a federal court within the Commonwealth. The chairperson and committee members shall be appointed by the Chief Justice of the Supreme Judicial Court. The purposes of the Jury Management Advisory Committee shall be as follows: to assist and counsel the Chief Justice and the Supreme Judicial Court in supervising the Office of Jury Commissioner; to perform direct supervision of the Office of Jury Commissioner in areas specified in this Chapter and in areas delegated to the Committee by the Chief Justice or the Supreme Judicial Court; to assist and counsel the Office of Jury Commissioner in the implementation and administration of this Chapter; to foster continuing study, research, and improvement of all aspects of the jury system; to encourage improved cooperation and efficiency between the state and federal courts in matters of juror selection and management;

and to encourage improved cooperation and efficiency between the judicial branch, other branches, and local units of government in the preparation and utilization of population lists and other materials. The Jury Management Advisory Committee may appoint such non-judicial members as it deems appropriate; non-judicial members shall not vote on the official business of the committee. The Office of Jury Commissioner shall reimburse members of the Jury Management Advisory Committee for reasonable expenses incurred in the performance of their duties.

Section 9. Jury Commissioner and Staff. The Office of Jury Commissioner shall be composed of a Jury Commissioner, four Deputy Jury Commissioners, Legal Counsel, and such other staff positions as the Jury Commissioner, with the approval of the Jury Management Advisory Committee, shall find necessary for the implementation and administration of this Chapter. The Jury Commissioner shall be appointed by the Supreme Judicial Court for the term of five years. The Deputy Jury Commissioners and Legal Counsel shall be appointed, each for a term of five years, by the Jury Commissioner, with the approval of the Jury Management Advisory Committee. The salaries of all employees of the Office of Jury Commissioner, including the Jury Commissioner, shall be established pursuant to the classification and compensation plan applicable to employees of the Supreme Judicial Court. The jury Commissioner shall be the executive head of the Office of Jury Commissioner. The Office of Jury Commissioner shall be organized into five departments: data processing, juror operations, administration and finance, local affairs, and legal. Each Deputy Jury Commissioner shall be the manager of one of the first four above-mentioned departments, and the Legal Counsel shall be the manager of the legal department.

Section 10. Rules and Regulations of the Supreme Judicial Court and the Jury Commissioner. The Supreme Judicial Court may make and amend rules of court, not inconsistent with this Chapter, designating the participating counties and regulating all aspects of the selection and management of grand and trial jurors. The Jury Commissioner, with the approval of the Supreme Judicial Court, may promulgate regulations setting forth policies, procedures, and forms for the selection and management of grand and trial jurors at local levels, in the juror pools, in courtrooms, and in other appropriate circumstances in furtherance of the objectives of this Chapter.

Section 11. Local Duties and Responsibilities. The Mayor, city manager, or other executive head of a city and the city clerk, jointly and severally, shall have the duty of fulfilling all obligations imposed upon their city under this Chapter. The Board of Selectmen, town manager, or other executive head of a town and the town clerk, jointly and severally, shall have the duty of fulfilling all obligations imposed upon their town under this Chapter. Obligations imposed upon cities and towns under this Chapter shall include those obligations established in the rules of the Supreme Judicial Court and in the regulations of the Jury Commissioner made and duly promulgated under this Chapter. Cities and Towns having Boards of Election Commissioners or Boards of Registrars of Voters may by letter to the Jury Commissioner signed by the

executive head of the city or town delegate certain responsibilities under this Chapter to such boards, but the ultimate responsibility for compliance shall not be delegated.

Section 12. Numbered Resident List. On or before the first day of June of each year, each city and town shall make a sequentially numbered list of the names, addresses, and dates of birth of all persons who were seventeen years of age or older as of the first day of January of the current year and who resided as of the first day of January of the current year in such city or town. The names of residents shall be listed and numbered, preferably in alphabetical order, one name to each number, along with such other information and in such form and format as shall be specified in the regulations of the Jury Commissioner. There shall be no duplication of names on the list. On or before the said date, each city and town shall submit one copy of this list to the Office of Jury Commissioner and make a copy of this list available for inspection by members of the public. Hereafter in this Chapter, this list will be referred to as the "Numbered Resident List" and a particular individual on such list will be referred to as a "numbered resident." The cost of preparing the Numbered Resident List shall be paid by the city or town.

Section 13. Numbered Resident File. On or before the first day of June of each year, each city and town having twenty thousand or more residents on its Numbered Resident List shall submit to the Office of Jury Commissioner an automated copy of its Numbered Resident List. This automated copy shall be a data processing file written on a magnetic computer tape of such kind and in such format as shall be specified in the regulations of the Jury Commissioner. Hereafter in this Chapter, this automated copy shall be referred to as the "Numbered Resident File." The obligation to submit a numbered Resident File shall be in addition to the obligation to submit a Numbered Resident List under the previous Section. Any city or town having less than twenty thousand residents on its Numbered Resident List may comply with this Section. Any city or town that complies with this Section shall have fulfilled all of its obligations for submission of population data to the Office of Jury Commissioner for the current year. The cost of preparing the Numbered Resident File shall be paid by the city or town. The Office of Jury Commissioner shall return computer tapes to the cities and towns within a reasonable time.

Section 14. Numbers of Prospective Jurors. On or before the first day of July of each year, the Office of Jury Commissioner shall determine the number of prospective jurors to be drawn from each city and town. This number shall be as nearly as possible equal to the ratio of the population of the city or town to the entire population of the juror district in which the particular city or town is situated multiplied by the total number of prospective jurors required for the juror district. The total number of prospective jurors required for each juror district shall be determined by the Jury Commissioner as a matter of discretion. The population of the cities, towns, and juror districts required under this Section shall be determined from the Numbered Resident Lists.

Section 15. Random Selection of Prospective Jurors. On or before the first day of July of each year, the Office of Jury Commis-

sioner shall randomly select prospective jurors for each city and town from the corresponding Numbered Resident List or Numbered Resident File as follows. The office shall generate a sequence or list of random numbers for each city or town. On or before the said date, the office shall mail to each city or town that has not submitted a Numbered Resident File under Section 13 of this Chapter the particular sequence of random numbers generated for that city or town. The number of random numbers in each sequence shall be equal to the total number of prospective jurors to be drawn from the corresponding city or town. No random number shall appear twice in the same sequence. No random number in any sequence shall be greater than the highest number or total number of residents on the Numbered Resident List for the corresponding city or town. Each random number in each sequence shall correspond to the numbered resident having the identical number on the Numbered Resident List or Numbered Resident File of the city or town. Each such numbered resident, so identified and selected, shall be a prospective juror of the city or town. The method of generation of random numbers shall be approved by the Jury Commissioner and shall be specified in the regulations of the Jury Commissioner. Technical data on the integrity of the random number generation method used under this Section shall be compiled by the Office of Jury Commissioner. Such data shall be available to members of the public upon request.

Section 16. Lists of Prospective Jurors. On or before the first day of August of each year, each city and town that has not submitted a Numbered Resident File under Section 13 of this Chapter shall submit to the Office of Jury Commissioner a typewritten list of the randomly selected prospective jurors from that city or town. This list shall be typed on special forms, supplied by the Office of Jury Commissioner without cost, in order that the list will be suitable for convention into a data processing file by the Office of Jury Commissioner. The content and format of this list and the special forms shall be specified in the regulations of the Jury Commissioner. The cost of typing the special forms shall be paid by the city or town. The cost of preparing a data processing file from the typewritten list shall be paid by the Office of Jury Commissioner.

Section 17. Prospective Juror List. On or before the first day of September of each year, the Office of Jury Commissioner shall prepare the Prospective Juror List for each city and town. Each list shall contain the names, addresses, dates of birth, and related information with each name for all randomly selected prospective jurors from the city or town. The list shall be in alphabetical order. The content and format of the Prospective Juror List shall be specified in the regulations of the Jury Commissioner. On or before the first day of October of each year, the Office of Jury Commissioner shall mail two copies of the Prospective Juror List to each city and town. Each city and town shall make this list available for inspection by members of the public. The Office of Jury Commissioner shall make the Prospective Juror List of any city or town available for inspection by members of the public upon request.

Section 18. Master Juror List. On or before the first day of October of each year, the Office of Jury Commissioner shall pre-

pare the Master Juror List for each juror district. The Master Juror List for a juror district shall contain the aggregate of the Prospective Juror List of cities and towns within the juror district. The Master Juror List shall be randomly shuffled by the Office of Jury Commissioner and stored as a data processing file on a magnetic tape or disk. After the random shuffling of the Master Juror List has occurred, the Office of Jury Commissioner shall summon grand and trial jurors for a juror district in sequence from the Master Juror List for the juror district commencing with juror service to be performed on the first court day in January of the succeeding calendar year, unless the Supreme Judicial Court orders otherwise. The Office of Jury Commissioner may inhibit the summoning of persons on the Master Juror List who have performed grand or trial juror service within the current year or previous three calendar years or who are currently scheduled to perform such service based upon the official records of the Office of Jury Commissioner. The Master Juror List shall not be a public record. The content and form of the Master Juror List shall be specified in the regulations of the Jury Commissioner. The method of generation of random numbers and the method of randomly shuffling the Master Juror List shall be specified in the regulations of the Jury Commissioner.

Section 19. Letter of Venire. At least twelve weeks prior to the time when the services of grand or trial jurors are required, the clerk of each court requiring such jurors shall send or deliver a letter of venire to the Office of Jury Commissioner. The letter of venire shall state the numbers of jurors required for grand juror service or for trial juror service, the court, and the juror district. In the case of grand juror service, the letter shall state the beginning date of the term, its estimated length, and the days of the week or weeks of the month on which grand jurors ordinarily will be expected to report for service. In the case of special grand jury, the letter may require the Jury Commissioner to summon jurors to appear for service forthwith or within a lesser period than would otherwise be required under this Section. In the case of trial juror service, the letter shall state the period or periods of juror service to which the letter applies and the number of jurors required for each day within each period. The letter shall contain any further information which the Jury Commissioner deems appropriate.

Section 20. Numbers of Jurors to be Summoned. At least twelve weeks prior the commencement of any term of grand or trial juror service, the Jury Commissioner shall determine, as a matter of discretion, the numbers of jurors to be summoned from each juror district for grand and trial juror service. In making these discretionary determinations, the Jury Commissioner shall consider, among other factors, the experience of each court with respect to the numbers of grand and trial jurors who are impanelled or whose services are used during the impanelling process versus the numbers of jurors who are summoned.

Section 21. Summoning Jurors. At least twelve weeks prior to the commencement of any term of grand or trial juror service, the Office of Jury Commissioner shall summon by first-class mail grand and trial jurors from the corresponding Master Juror List to appear for juror service within each juror district. The summons

shall state whether the anticipated service is that of a grand or trial juror, the beginning date of the term; the name, address, hour, and room number, if any, of the courthouse or office to which the juror is directed to report on the first day of service; the fact that a trial juror has the right to one postponement of his term of juror service for not more than one year; the fact that a knowing failure to obey the summons without justifiable excuse is a crime, which, upon conviction, may be punished by fine of not more than two thousand dollars; and such other information and instructions as are deemed appropriate by the Jury Commissioner.

Section 22. Notice of Qualifications for Juror Service. Enclosed with the juror summons shall be a notice of qualifications for juror service. A summary of Section 6 of this Chapter shall be included in the said notice. This notice shall contain any further information and directions that the Jury Commissioner deems appropriate.

Section 23. Juror Confirmation Form. Enclosed with the juror summons shall be a juror confirmation form. When completed by the juror, this form shall certify whether or not the juror is qualified to serve as a trial or grand juror. The form shall contain a place where the juror may insert the month, day, and year, and an alternate month, day, and year to which the juror elects to postpone his juror service. The form shall contain a place where the juror may make or acknowledge a declaration that hardship would be imposed upon him if he were required to serve at the court location to which he was summoned; and the form shall contain a place where the juror may designate a more convenient jury-trial location within the juror district. The form shall contain a place where the juror may insert name and address corrections, if applicable. The form shall contain, on its face or reverse side, a place where the Jury Commissioner may require the juror to provide factual information and reasons in support of a determination by the juror that he is not qualified to perform juror service. The form shall contain such other information and instructions as the Jury Commissioner deems appropriate. The form shall have a place for the signature of the juror, and it shall be signed under the penalties of perjury.

Section 24. Confidential Juror Questionnaire. Enclosed with the summons shall be a confidential juror questionnaire. The information elicited by the questionnaire shall be such information as is ordinarily raised in voir dire examinations of jurors, including the juror's name, sex, age, residence, marital status, number and ages of children, education level, occupation, employment address, spouse's occupation, spouse's employment address, previous service as a juror, present or past involvement as a party or civil or criminal litigation, relationship to a police or law enforcement officer, spouse's relationship to a police or law enforcement officer, and such other information as the Jury Commissioner deems appropriate. The questionnaire shall contain the juror's declaration that the information supplied in the completed questionnaire is true to the best of his knowledge and that he understands that a wilful misrepresentation of a material fact therein is a crime, which, upon conviction, may be punished by a fine of not more than two thousand dollars. Immediately below such declaration, the question-

nair shall contain a place for the signature of the juror. A notice of the confidentiality of the completed questionnaire shall appear prominently on the face of the questionnaire.

Section 25. Use and Disposal of Confidential Juror Questionnaire. Unless the court orders otherwise, the clerk of court or assistant clerk shall provide copies of the appropriate completed questionnaires to the trial judge and counsel for use during voir dire. Except for disclosures made during voir dire or unless the court orders otherwise, the information inserted by jurors in the questionnaires shall be held in confidence by the court, the clerk or assistant clerk, the parties, trial counsel, and their authorized agents. Upon completion of voir dire, the parties and their counsel shall return all copies of the completed questionnaires to the clerk or assistant clerk. The clerk of court shall retain in a secure place all original completed questionnaires for each impanelled jury and alternate jurors until final disposition of the case. These completed questionnaires shall not constitute a public record. All copies of juror questionnaires, other than the copies retained by the trial judge and the originals retained by the clerk, shall be destroyed as soon as practicable after the completion of voir dire.

Section 26. Return of Juror Confirmation Form. Every grand or trial juror shall return the juror confirmation form, duly completed and signed, within ten days after receipt of the juror summons. The Office of Jury Commissioner shall provide a prepaid and addressed envelope for this purpose. If the juror is unable to complete and sign the form, another person may do it for him. A notice of the juror's duty to return the completed confirmation form within ten days of its receipt shall appear prominently on the face of the confirmation form. Where a juror is unable to return a juror confirmation form because of loss or destruction of the form or where there is insufficient time for the juror to confirm by mail, the Office of Jury Commissioner may accept an oral confirmation from the juror by telephone or in person; such oral confirmation shall be as valid and binding as if the confirmation were made in writing.

Section 7. Second Summons. Any grand or trial juror from whom the Office of Jury Commissioner has not received a duly completed and signed juror confirmation form by the eight week preceding the term of service for which the juror was summoned shall be summoned a second time. The second summons shall have the same content and form as the first summons, except the words "Second Summons" shall appear prominently on the face of the summons. The second summons shall be sent by first-class mail. A juror confirmation form and confidential questionnaire shall be enclosed with the second summons. Any juror who receives a second summons shall return a duly completed and signed juror confirmation form within five days of its receipt.

Section 28. Supplementary Summons. On or before the sixth week preceding any term of grand or trial juror service, the Office of Jury Commissioner may summon additional grand or trial jurors if it appears from the returned juror confirmation forms that the number of previously summoned jurors who will report for service will be inadequate for the needs of the court. Any juror who is summoned under this Section shall return a duly completed and

signed juror confirmation form within ten days of its receipt. Any grand or trial juror summoned under this Section from whom the Office of Jury Commissioner has not received a duly completed and signed juror confirmation form by the third week preceding the term of service for which he was summoned shall be summoned a second time. The second summons shall have the same content and form as the first summons except the words "Second Summons" shall appear prominently on the face of the summons. The second summons shall be sent by first-class mail. A juror confirmation form and confidential questionnaire shall be enclosed with the second summons. Any juror who receives a second summons shall return a duly completed and signed juror confirmation form within five days of its receipt.

Section 29. Forthwith Summons. The Office of Jury Commissioner may summon additional grand and trial jurors to appear for juror service forthwith or at a time certain, with or without the right of postponement or juror service, with or without the opportunity to change the courthouse to which the juror has been assigned, in order to meet the urgent needs of the court. The Office of Jury Commissioner shall employ whatever means of notice, including telephone notice, that is appropriate under the circumstances.

Section 30 Cancellation of Juror Service. The Office of Jury Commissioner may cancel grand or trial juror service whenever it appears that the number of jurors scheduled to appear is in excess of the number reasonably required to conduct the business of the court without delay. The Office of Jury Commissioner shall employ whatever means of notice, including telephone notice, that is appropriate under the circumstances. Any juror or standby juror whose service has been cancelled shall not be required to perform juror service at another time or place because of the cancellation, but such juror shall not be entitled to be disqualified under Section 6 of this Chapter if he should be randomly selected again within the succeeding three-year period.

Section 31. Modification of Juror Service. The Office of Jury Commissioner may modify the date, location, or other condition of grand or trial juror service in order to meet the urgent needs of the court. The Office of Jury Commissioner shall employ whatever means of notice, including telephone notice, that is appropriate under the circumstances.

Section 32. Standby Jurors. The Office of Jury Commissioner or the court may impose a standby status condition on any trial or grand juror before or during his term of service. A juror on whom such condition has been imposed shall be referred to as a standby juror. The standby juror shall be prepared to serve on each day of his term of service, but he shall not appear for service unless directed to do so in the following manner. The standby juror shall make telephone inquiry to a designated office or court after three o'clock in the afternoon on the court day preceding his term of service in order to obtain specific instructions as to whether or not he should appear for juror service on the following court day. A juror may be continued on standby status from day to day, but his term of service shall not be enlarged because of the standby condition unless the juror has been assigned to a case or unless ordered

by the court. The designated office or court may use an automatic telephone answering device for the purpose of giving instructions to standby jurors. A notice of standby status may be enclosed with the juror summons or may be sent separately. Any other form of standby notice reasonably contemplated to give actual notice may be used. The court shall have discretionary authority to excuse a juror from the standby condition upon a showing of unusual hardship caused by the condition, but such juror shall serve or be available to serve without the standby condition unless further excused by the court. The Office of Jury Commissioner or the court may order a standby juror to serve or to appear for service upon date and time certain without the necessity of telephone inquiry by the standby juror. The Office of Jury Commissioner or the court may make further modifications of the standby condition as are reasonable to facilitate the management of cases before court.

Section 33. Presentation of Confidential Juror Questionnaire. On the first day of his term of grand or trial juror service, each juror shall bring to court and present to the officer in charge of jurors his summons, his confidential juror questionnaire, duly completed and signed, and any subsequent notices of postponement or location transfer received by him. Notices of these duties shall appear prominently on the summons, questionnaire, and notice of postponement or location transfer, respectively.

Section 34. Misrepresentation in Confidential Juror Questionnaire; Penalty. Any juror or other person who wilfully misrepresents a material fact in the confidential questionnaire for the purpose of either avoiding or securing service as a grand or trial juror shall be guilty of a crime, and, upon conviction, may be punished by a fine of not more than two thousand dollars.

Section 35. Authority to Request Criminal Records. The court, Office of Jury Commissioner, clerk of court or assistant clerk, and the supervising officer assigned to the juror pool shall have authority to inquire into the criminal history records of grand and trial jurors for the purpose of corroborating and determining their qualifications for juror service. The said authority shall include the right to request and receive such criminal history records and information from the criminal offender record information system as is necessary for the purpose of carrying out the provisions of this Chapter. All criminal offender record information obtained under this Section shall be held confidential by persons authorized hereunder.

Section 36. Trial Juror's Right of One Postponement. A trial juror shall have the right to one postponement of his term of juror service for not more than one year. The trial juror must exercise this right by duly completing and returning the juror confirmation form in which his election to postpone shall be indicated. The month, day, and year and an alternate month, day, and year to which the service is postponed shall be indicated in the confirmation form. The Office of Jury Commissioner shall have authority to effectuate such first postponements. If the postponement date designated by a trial juror is improper, unavailable, or inconvenient for the court, the Office of Jury Commissioner shall assign the alternate postponement date unless that date is also improper,

582 unavailable, or inconvenient for the court in which case the Office
583 of Jury Commissioner shall assign a date of service which is
584 reasonably close to the postponement date selected by the trial
585 juror. The Jury Commissioner, with the approval of the Jury
586 Management Advisory Committee, shall have discretionary au-
587 thority to limit the numbers of postponements allowed into each
588 courthouse each day in order to maintain the integrity of demo-
589 graphic cross-sections appearing in the juror pools.

590 *Section 37. Assignment of Courthouse Locations.* Grand and
591 trial jurors shall be summoned at random from the entire juror
592 district to perform juror service at a designated court location
593 within the juror district. The Office of Jury Commissioner may
594 permit a trial juror to serve at a different jury-trial location within a
595 juror district upon a declaration by the juror that hardship would
596 be imposed upon him if he were required to serve at the original
597 court location. The Jury Commissioner, with the approval of the
598 Jury Management Advisory Committee, shall have discretionary
599 authority to limit the numbers of courthouse transfers allowed to
600 or from each courthouse each day in order to maintain the integrity
601 of the demographic cross-section appearing in the juror pools.

602 *Section 38. Notice of Postponement or Courthouse Transfer.*
603 Not later than two weeks after the receipt of the juror confirmation
604 form containing an election to postpone or a request to transfer
605 juror service to a different court location, the Office of Jury Com-
606 missioner shall send a notice to the juror by first-class mail. This
607 notice shall state the date of postponement, if any, effectuated by
608 the Office of Jury Commissioner. The notice shall also state wheth-
609 er or not the request for a location transfer has been allowed and
610 the current location to which the juror is assigned. The juror shall
611 appear for service on the date and at the location indicated in this
612 notice without further summoning; the notice shall contain a state-
613 ment to this effect prominently on its face.

614 *Section 39. Separation of Powers.* The legislative, executive,
615 and judicial departments of the Commonwealth and of the United
616 States shall not be impeded by the provisions of this Chapter from
617 freely exercising their independent powers and duties. Any of the
618 following persons who has been summoned as a juror or who is
619 performing juror service and who certifies in writing to the court or
620 the Office of Jury Commissioner that there is important business of
621 the Commonwealth or the United States which requires his pres-
622 ence away from the court during his term of service shall be granted
623 as a matter of right an immediate postponement of his term of
624 service as a grand or trial juror: the governor, the lieutenant-gov-
625 ernor, councillors, other state constitutional officers, senators, repre-
626 sentatives, and justices of the Supreme Judicial Court; the presi-
627 dent, vice president, other constitutional officers of the United
628 States, senators, representatives, and justices of the Supreme
629 Court. In the certificate to the court, the person requesting the
630 postponement shall state a period of time reasonably contemplated
631 for the completion of such official business. The length of the
632 postponement granted by the court shall not be less than the period
633 stated in the certificate. Any person who qualifies under this sec-
634 tion may request and shall receive any number of postponements.

635 *Section 40. Telephone Notice.* A grand or trial juror, including

an alternate juror, may be permitted by the court to be available for juror service or continued juror service upon telephone notice. A juror who agrees to be available on telephone notice shall provide to the court a telephone number or numbers by which he may be notified with certainty to begin or resume his juror service not more than one hour after such notice has been given. Such juror shall conduct his affairs so that he shall insure his compliance with the conditions of telephone notice. The court may impose further conditions on telephone notice.

Section 41. Deferments, Excuses, and Limitations on Jurors' Terms of Service. The court or the Office of Jury Commissioner shall have authority to defer or advance any term of grand or trial juror service upon a finding of hardship, inconvenience, or public necessity provided the juror recognizes his firm obligation to perform juror service on the new date. The court shall have authority to excuse a grand juror from juror service, in part or in full, upon a finding of hardship, inconvenience, or public necessity taking into consideration the length of grand juror service. The court shall have authority to excuse a trial juror from juror service, in part or in full, upon a finding of extreme hardship; the court shall exercise this authority strictly. Notwithstanding the fact that a juror has been summoned as a grand or trial juror, with or without right of postponement of service, the court shall have the discretionary authority to require the juror to serve either as a grand or trial juror, immediately or at a future date, at the original court location or at a different court location. The court may impose reasonable conditions and limitations, including appropriate time limitations, upon a term of juror service. It shall be the policy of this Chapter that every trial juror shall be prepared to serve three trial days; the Court shall not grant term limitations of less than three trial days except upon a finding that extreme hardship would be imposed upon the juror in the absence of such limitation. The court shall have the discretionary authority to dismiss a juror at any time in the best interests of justice. The court shall have authority to excuse and discharge an impanelled juror prior to jury deliberations after a hearing upon a finding of extreme hardship. The court shall have authority to excuse and discharge a juror participating in jury deliberations after a hearing only upon a finding of an emergency or other compelling reason. The court shall have authority to discharge an impanelled juror who has not appeared for juror service upon a finding that there is a strong likelihood that an unreasonable delay in the trial would occur if the court were to await the appearance of the juror. At any time during the trial, the court shall discharge any juror whose term limitation has expired upon the demand of the juror; such discharge shall not be a ground for objection by any party. The court may exercise any authority granted in this Section at any time before or during a juror's term of service.

Section 42. Extended Trials. In the event a trial is expected by the court to last more than three trial days, the trial judge shall announce this fact to jurors before the jury is impanelled. The trial judge may excuse a juror from performing his juror service on such an extended trial upon a finding of hardship, inconvenience, or public necessity taking into consideration the expected length of

the extended trial, but any juror so excused shall otherwise complete his term of juror service.

Section 43. Length of Juror Service. The length of the term of service for trial jurors shall be one day unless a juror is assigned to or impanelled on an incompleated trial when the term ends or unless the court orders otherwise. Nothing in this Section shall prevent a trial juror from serving or participating on more than one trial during his term except that a trial juror who has participated in the rendering of a verdict shall not be required to participate in a second trial even though the juror may not have completed his first day of juror service at the time of commencement of the second trial. Jurors in the juror pool awaiting assignment to a trial shall be discharged as early in the afternoon as possible after it has been determined that their services will not be needed. The length of the term of service for grand jurors shall be three months unless the court enlarges such term. The court shall have authority to enlarge grand jurors' terms of service upon a finding that the efficient administration of justice requires such enlargement.

Section 44. Nonperformance of Juror Service; Penalty. Any grand or trial juror who fails to appear for or complete juror service or who fails to perform any condition or juror service without justifiable excuse shall be guilty of the crime of nonperformance of juror service and, upon conviction, may be punished by a fine of not more than two thousand dollars.

Section 45. Enforcement of Juror Service by the Court. The court shall take whatever actions as may be appropriate in order to enforce the provisions of this Chapter strictly. Upon a finding that a juror will not appear to perform or complete grand or trial juror service or any condition thereof, the court may issue a warrant for the arrest of the juror. Upon any such finding, the court may order a local police department to have a law enforcement officer make a personal visit to the home or business of the juror in order to give oral notice and warning to the juror that he must perform juror service or be subject to possible arrest. This order may be communicated by telephone to the local police department by the clerk or assistant clerk of court. The local police department shall cooperate fully with the court and shall carry out all orders of the court made under this Section. The local police department shall acknowledge such oral notice and warning to the clerk or assistant clerk of court as soon as practicable after it has been made; the acknowledgement may be by telephone unless the court orders otherwise. Upon any such finding, the court may take such other actions as are likely to compel the juror to appear before the court or to obey the order of the court. Nothing in this Section shall alter, limit, or qualify the power or authority of the court to find and punish a juror or any other person or corporation for criminal contempt.

Section 46. Delinquency Notice. The Office of Jury Commissioner may send a delinquency notice by certified or first-class mail or by delivery by a sheriff or constable to any grand or trial juror who has failed to appear for juror service based upon the records in the Office of Jury Commissioner. The purpose of the delinquency notice shall be to notify the juror of his delinquency status and to cause the juror to contact the Office of Jury Commissioner in order

to resolve the problem and be removed from delinquency status. A juror shall respond to a delinquency notice, in the manner specified in the notice, as soon as practicable but in no event later than twenty days after receipt of the notice; a statement to this effect shall appear in the notice. The Office of Jury Commissioner shall have discretionary authority to resolve problems and disputes with delinquent jurors or with jurors appearing to be delinquent in accordance with prescribed guidelines approved by the Jury Management Advisory Committee.

Section 47. Application for Criminal Complaint. The Office of Jury Commissioner may prepare an application for the issuance of a criminal complaint against any grand or trial juror who has not been removed from delinquency status by the Office of Jury Commissioner within thirty days after the date of the delinquency notice.

The application shall aver that the named person was duly selected and summoned to perform trial or grand juror service at a specified location on a specified date and that such person has failed to appear for juror service without justifiable excuse in violation of Section 44 of this Chapter. The information provided in the application shall be based upon the records of the Office of Jury Commissioner. The application shall contain the name, address, and identification number of the juror and a summary of all official transactions between the juror and the Office of Jury Commissioner that have occurred as of the date of the application. At the bottom of the application, there shall be a certificate signed by the legal Counsel for the Office of Jury Commissioner declaring that the information provided in the application is true and complete to the best of his knowledge and belief. The application shall contain such further information as deemed appropriate by the Jury Commissioner with the approval of the Jury Management Advisory Committee. The application may be submitted by mail or personal delivery to any District Court having criminal jurisdiction over the juror. The Office of Jury Commissioner may send a copy of this application to the juror by first-class or certified mail. The Legal Counsel or his delegate shall be authorized to represent the Jury Commissioner and the Office of Jury Commissioner in all judicial proceedings arising out of any application for the issuance of a criminal complaint under this Section or otherwise.

Section 48. Research. The Office of Jury Commissioner shall perform studies, foster research, and implement new procedures which are contemplated to accomplish the following: improvement of all aspects of the administration of jurors; reduction of the costs of selection, management, and compensation of jurors; monitoring and improvement of the integrity of jury pools and jury panels; more effective utilization of jurors in the jury pools; improved understanding by jurors of their duties and of the court's charge and instructions; providing for the reasonable comfort and convenience of jurors during their terms of service; and providing jurors with a heightened appreciation of the judicial system.

Section 49. Delegation of Authority to Office of Jury Commissioner. The Jury Management Advisory Committee or the court may delegate to the Jury Commissioner or the office of Jury Commissioner such authority as is appropriate for the efficient

administration of this Chapter in accordance with prescribed guidelines approved by the Jury Management Advisory Committee or the court.

Section 50. Compensation and Reimbursement Policy. The compensation and reimbursement policy of this Chapter shall be to prevent financial hardship from being imposed upon any juror because of performance of juror service insofar as may be possible under this Chapter. Where financial hardship exists, the court shall attempt to place the juror into the same financial position as he would have been were it not for his performance of juror service. The Jury Commissioner may issue regulations, not inconsistent with this Chapter, further defining rights and obligations of jurors and employers with respect to jurors' compensation and reimbursements during juror service.

Section 51. Compensation of Employed Jurors during First Three Days of Service. Each regularly employed trial or grand juror shall be paid his regular wages by his employer for the first three days, or part thereof, of juror service. Regular employment shall include part-time, temporary, and casual employment as long as the juror's employment hours may reasonably be determined by a schedule or by custom and practice established during the three-month period preceding the juror's term of service. Each self-employed trial or grand juror shall compensate himself for the first three days, or part thereof, of juror service.

Section 52. Employer's or Self-employed Juror's Financial Hardship. The court shall have the authority to excuse an employer from the duty to compensate a juror-employee or to excuse a self-employed juror from the duty to compensate himself for the first three days, or part thereof, of trial or grand juror service upon a finding that extreme financial hardship would be imposed upon the employer or self-employed juror if such duty were not removed. If an employer or self-employed juror is so excused, the court shall award reasonable compensation in lieu of wages to the juror to be paid by the State for the first three days, or part thereof, of juror service; this award shall not exceed fifty dollars per day of trial or grand juror service. The hearing on the employer's extreme financial hardship shall occur no later than twenty days after the tender of the juror service certificate to the employer.

Section 53. Reimbursement of Unemployed Jurors during the First Three Days of Service. Each unemployed trial or grand juror upon application shall be reimbursed by the State for reasonable travel, child-care, and other necessary out-of-pocket expenses, except food, incurred during the first three days, or part thereof, of juror service. The Office of Jury Commissioner, with the approval of the Jury Management Advisory Committee, shall establish guidelines for reimbursement of jurors under this Section. Each reimbursement award falling outside such guidelines shall be approved by the court. A reimbursement award under this section shall not exceed fifty dollars per day of juror service. Any juror who is not regularly employed under Section 51 of this Chapter, including but not limited to retired persons, homemakers, students, and persons receiving unemployment benefits, shall be entitled to reimbursement under this Section. The juror's application for reimbursement under this Section shall be made prior to or

during the judicial discretion hearings on the first morning of the juror's term of service. An unemployed trial or grand juror receiving benefits under the laws of employment security of this Commonwealth shall not lose such benefits because of his performance of the first three days of juror service.

Section 54. Compensation of Trial Jurors after First Three Days of Service. Each trial juror who serves more than three days shall be paid by the State for the fourth day of service and each day thereafter at the rate of fifty dollars per day of service. Trial juror receiving payment under this Section shall not be entitled to additional reimbursement for travel or other out-of-pocket expenses.

Section 55. Grand Jurors' Financial Questionnaire. Immediately following the impanelling of the grand jury, each grand juror and alternate grand juror shall complete and sign a financial questionnaire under the penalties of perjury. The completed questionnaire shall contain the financial data necessary for the determination of a daily compensation rate for the grand juror to be paid by the State for the fourth and subsequent days of grand juror service. The questionnaire shall indicate whether or not the grand juror is employed and, if so, the regular daily wages of the juror and the daily compensation the juror expects to receive from his employer while performing grand juror service. The questionnaire shall indicate travel expenses, if any, in excess of those ordinarily incurred by the juror, as a result of grand juror service. The questionnaire shall be in such form and shall contain such further information as deemed appropriate by the Jury Commissioner with the approval of the Jury Management Advisory Committee. The court, clerk of court, or assistant clerk may make inquiry to a grand juror's employer for the purpose of corroborating or clarifying information supplied by the grand juror or to ascertain relevant policies of the employer. The information supplied by grand jurors in these questionnaires shall be held confidential by the court, clerk of court, and assistant clerks. A grand juror shall notify the court if at any time during the period of his grand juror service the information provided by the juror in the financial questionnaire changes or becomes obsolete. A notice of this duty shall appear prominently on the questionnaire. The completed questionnaires shall be kept on file in the Office of the Clerk of Court for one year after the discharge of the grand jury. These questionnaires shall not constitute a public record.

Section 56. Grand Jurors' Daily Compensation Rate. On the first day of grand juror service, the court shall hold a private hearing with each impanelled grand juror and alternate grand juror. The purpose of this hearing shall be to determine a daily compensation rate for each grand juror, not exceeding fifty dollars per day of service, to be paid by the State to the juror for the fourth and subsequent days of grand juror service. In this hearing the court shall consider the information contained in the grand juror financial questionnaire and other relevant information. In determining the daily compensation rate, the court shall implement the following policy. For each day of service, a grand juror shall be entitled to receive, cumulatively from his employer and the State, an amount equal to the greater of the following two rates: fifty dollars per day; or, an amount not in excess of the juror's regular

daily wages plus such daily travel expenses as are in excess of those ordinarily incurred by the juror, provided the State's contribution to this amount shall not exceed fifty dollars per day.

Section 57. Compensation of Grand Jurors after First Three Days of Service. Each grand juror who serves more than three days shall be paid by the State for the fourth day of service and each day of service thereafter the daily compensation rate for the particular grand juror determined under the previous Section of this Chapter.

Section 58. Miscellaneous Juror Compensation Rules. An alternate grand or trial juror shall have the same rights of compensation and reimbursement from his employer and the State as a juror under all applicable provisions of this Chapter. A grand or trial juror shall not be compensated by the State nor shall he be credited with a day of juror service unless the juror actually appears for juror service as directed or unless specifically provided for in this Chapter. Upon a finding that an employed juror may not reasonably resume his employment during a holiday, court adjournment, or because of cancellation of juror service and the juror will lose wages because of such holiday, adjournment, or cancellation, the court may credit the juror with a day of juror service and/or make an award to the juror of reasonable compensation in lieu of wages; such award shall not exceed fifty dollars per day. A juror who is absent from juror service because of serious illness or other compelling reason, as determined by the court or Office of Jury Commissioner, may be credited with a day of juror service. A juror on standby or telephone notice may be reimbursed by the court or Office of Jury Commissioner for reasonable telephone, travel, or other out-of-pocket expenses incurred as a result of the performance of the standby conditions or the telephone notice conditions even though the juror may not perform juror service; such reimbursement shall not exceed fifty dollars per day.

Section 59. Special Awards of Compensation and Reimbursement. Notwithstanding other provisions of this Chapter, the court shall have authority to make special awards of compensation and reimbursement to any juror or to any other person on behalf of a juror based on unusual circumstances or which are appropriate for the fair administration of this Chapter. The court may provide for reasonable costs and expenses including food, lodging, transportation, and amenities of sequestered jurors; the court or the Office of Jury Commissioner may make special arrangements, including special travel arrangements, for handicapped and elderly jurors or handicapped and elderly dependents of jurors; the court may make appropriate provisions for the safety and comfort of jurors and the security of jurors' property. The court may provide for emergency medical services for jurors. The court may reimburse a juror for reasonable out-of-pocket expenses incurred because of personal injury or property loss suffered by the juror while performing juror service upon a finding that the Commonwealth is liable therefor or it is in the best interests of the administration of the jury system of the Commonwealth to do so.

Section 60. Juror Service Certificate. The juror service certificate shall contain the name and address of the juror; the name, address, and juror district of the court in which the juror's service

was performed; the week in which the certificate applies; the number of days of juror service performed by the juror during the said week, and the specific dates thereof; the total compensation received by the juror from the State during the said week; a declaration of the duty of an employer to compensate a juror-employee for the first three days, or part thereof, of juror service and the right of an employer to be excused from such duty by the court upon showing of extreme financial hardship; and any other information which the Jury Commissioner deems appropriate. Each juror service certificate shall be completed in duplicate, one copy for the juror, one copy for the juror's employer.

Section 61. Mailing of Juror Service Certificates. Each week, the Office of Jury Commissioner shall mail juror service certificates to those grand and trial jurors who have performed juror service during the previous week. A juror who seeks compensation from his employer for juror service shall tender the employer's copy of the service certificate to this employer as soon as practical after its receipt. A notice of this duty shall appear prominently on the certificate.

Section 62. Jurors' Checks. Grand and trial jurors shall receive payments due from the State by check on a weekly basis. Each check shall include all compensation for juror services and authorized reimbursements incurred by the juror during the previous week. The Office of Jury Commissioner shall prepare and mail these checks. The Comptroller of the Commonwealth shall establish a separate account for jurors' compensation and reimbursements under this Chapter. The Office of Jury Commissioner shall draw upon this account for all checks issued under this Section. The checks may be issued with data processing equipment, and a printed or stamped facsimile signature of the Jury Commissioner shall be authorized. No check shall be valid if the amount is greater than three hundred and fifty dollars. The Office of Jury Commissioner shall not be authorized to disburse monies for sequestered jurors expenses or other special awards ordered by the court; these disbursements shall be handled in the Office of the Clerk of Courts.

Section 63. Enforcement of Employer's Duty to Compensate Jurors. Any employer who fails to compensate a juror-employee under the applicable provisions of this Chapter and who has not been excused from such duty of compensation shall be liable to the juror-employee in tort. Upon the expiration of thirty days after the tender of the juror service certificate to the employer, the juror may commence a civil action in any District Court having jurisdiction over the parties. Extreme financial hardship on the employer shall not be a defense to this action. The court may award treble damages and reasonable attorney's fees to the juror upon a finding of wilful conduct by the employer.

Section 64. Harassment by Juror's Employer; Penalties and Enforcement. Any wilful violation of Section 63 of this Chapter by an Employer shall also be a violation of this Section. A juror seeking a civil remedy against an employer shall have an election to proceed either under Section 63 or this Section. An employer shall not deprive a juror-employee of his employment or any incidents or benefits thereof, nor shall an employer harass, threaten, or

coerce an employee because the employee has received a juror summons, responds thereto, performs any obligation or election of juror service as a grand or trial juror, or exercises any right under any Section of this Chapter. An employer shall not impose compulsory work assignments upon any juror-employee nor shall the employer do any other intentional act which will substantially interfere with the availability, effectiveness, attentiveness, or peace of mind of the employee during the performance of his juror service. Any employer who violates this Section shall be guilty of a crime, and, upon conviction, may be punished by a fine of not more than five thousand dollars. Any employer who violates this Section also shall be liable in tort to the juror-employee. The juror-employee may commence a civil action in the Superior Court for such damages and injunctive relief as may be appropriate. The court may award treble damages and reasonable attorney's fees to the juror upon a finding of wilful conduct by the employer. The Legal Counsel for the Office of Jury Commissioner may submit an application for the issuance of a criminal complaint in any court of competent jurisdiction against an employer who has violated this Section or Section 63 of this Chapter.

Section 65. Juror's Handbook and Educational Materials. Not later than ten days prior to each trial juror's term of service, the Office of Jury Commissioner shall mail to each juror a copy of the trial juror's handbook. The handbook shall notify the juror of his pending juror service. The handbook shall inform jurors in lay terminology of the nature and extent of their forthcoming duties and responsibilities. The handbook may introduce and orient jurors to basic trial procedures and legal terminology. The handbook shall contain maps and directions to the jury-trial locations and such other practical information as the Jury Commissioner deems appropriate. The full text of the handbook shall be specified in the regulations of the Jury Commissioner. Each trial juror shall read the handbook before he reports for juror service. The handbook shall be a public document. The Jury Commissioner may distribute copies of the handbook, and related educational materials, to public and private schools, civic organizations, the press, and others, in order to promote citizen awareness and understanding of the jury system of this Commonwealth. The Jury Commissioner may, with the approval of the Jury Management Advisory Committee, distribute or exhibit to jurors further educational materials, recordings, films, videotapes, lectures, and the like, as he deems appropriate to assist jurors in understanding and fulfilling their duties and obligations. Not later than ten days prior to each grand juror's term of service, the Office of Jury Commissioner shall mail to each juror such educational materials and practical instructions as are deemed appropriate by the Jury Commissioner to assist grand jurors in carrying out their duties and responsibilities. These materials shall be approved by the Jury Management Advisory Committee. In the event of any conflict, the instructions or charge of the trial judge in a particular case shall be paramount and shall supersede the trial juror handbook or grand juror general information provided under this Section.

Section 66. Juror Information Telephone Lines. The Office of Jury Commissioner, with the approval of the Jury Management

Advisory Committee, may establish a sufficient number of telephone lines for the purposes of responding to juror inquiries, scheduling jurors' terms of service, disseminating general information and standby information to jurors, and for use in snow emergencies, other public emergencies, and personal problems and emergencies of jurors. Automatic telephone answering devices may be used where appropriate. These information lines may be toll-free where justified by the volume of use and public convenience. Juror information lines and automatic answering equipment may be located in juror pools or other appropriate locations outside of the Office of Jury Commissioner.

Section 67. Juror Orientation Program. On the first morning of juror service, grand and trial jurors shall be oriented by the court as to their duties and responsibilities. The court may include such information and instructions as it deems appropriate. The court may use a videotapes presentation for this orientation. In the event of any conflict, the instructions or charge of the trial judge in a particular case shall be paramount and shall supersede the general information provided to jurors in the orientation program. The Office of Jury Commissioner, with the approval of the Jury Management Advisory Committee, may prepare such videotaped materials and other materials as are appropriate for use in the juror orientation programs. The Office of Jury Commissioner may permit juror orientation materials to be used for educational purposes by schools, civic organizations, the press, and other groups in order to foster improved public understanding of the jury system. Unless the court orders otherwise, members of the public may be present in the juror pool during juror orientation programs for educational purposes.

Section 68. Jurors' Welcome. Following the juror orientation program, a member of the court shall personally appear before the jurors and make a brief welcoming address. The Office of Jury Commissioner, with the approval of the Jury Management Advisory Committee, may prepare suggested guidelines for the format and content of the jurors' welcome. Unless the court orders otherwise, members of the public may be present in the juror pool during the jurors' welcoming address and educational purposes. The Chief Justice or the presiding justice at each jury-trial location shall assign a justice to appear each day in each juror pool for the purpose of making the jurors' welcoming address and presiding over the judicial discretion hearings. In the event more than one court draws jurors from the same juror pool, the responsibility for welcoming jurors and presiding over the judicial discretion hearings shall be shared cooperatively among the respective courts.

Section 69. Judicial Discretion Hearing. Following the jurors' welcome, the court shall hold a private hearing with each juror or juror's employer who requests to be heard. The purpose of these hearings shall be to dispose of all urgent personal problems of jurors and employers as to possible excuses, postponements, limitations on the length of juror service, compensation, reimbursement, qualifications for juror service, or any other condition of juror service. The Office of Jury Commissioner, with the approval of the Jury Management Advisory Committee, may prepare suggested guidelines for the judicial discretion hearing. The court may

1120 permit observers in the judicial discretion hearing for educational
1121 purposes as long as the identities of jurors and employers are kept
1122 confidential by such observers and the personal decorum of the
1123 hearing is not lost thereby.

1124 *Section 70. Clerk's List of Jurors.* Not later than ten days in
1125 advance of jurors' scheduled appearances, the Office of Jury Com-
1126 missioner shall send or deliver to the appropriate clerks of court a
1127 list of the grand and trial jurors expected to appear for service in
1128 the respective courts. The list shall contain the name, address, and
1129 date of birth of each juror and such other information as the Jury
1130 Commissioner, with the approval of the Jury Management Advi-
1131 sory Committee, deems appropriate. Unless the court orders other-
1132 wise, the list shall be available upon request for inspection by
1133 parties, counsel, their agents, and members of the public.

1134 *Section 71. Additional or Alternate Jurors.* In every twelve-
1135 person jury case, the court shall impanel at least two additional
1136 jurors. In every six-person jury case, the court shall impanel at least
1137 one additional juror. Alternate jurors shall not be identified until
1138 the time of submission of the case by the court to the jury for its
1139 deliberations upon a verdict. If more than the number of jurors
1140 required for deliberation are available, the court shall direct the
1141 clerk or assistant clerk to place the names of all available jurors
1142 except the foreperson into a box or drum and to select at random
1143 the names of the appropriate number of jurors necessary to reduce
1144 the jury to the proper number of members required for deliberation
1145 in the particular case. The jurors so selected shall be known as
1146 alternate jurors. During the deliberations of the jury, the trial
1147 judge, as a matter of discretion, shall make such provisions for the
1148 security, comfort, and convenience of the alternate jurors as are
1149 reasonable and consistent with the requirements of the case before
1150 the court. The alternate jurors may be kept separate from the jury
1151 in some convenient location, subject to the same rules and proce-
1152 dures as govern the jury during its deliberations, until the jury has
1153 agreed upon a verdict or has been otherwise discharged. The
1154 alternate jurors may be permitted to be present with the jury during
1155 its deliberations provided the trial judge instructs the jury and the
1156 alternate jurors that the alternate jurors shall not participate in any
1157 manner in the deliberations nor shall they have any communica-
1158 tions, oral or visual, with any member of the jury or with another
1159 alternate juror regarding the deliberations of the jury. The alter-
1160 nate jurors may be permitted to leave the courthouse on telephone
1161 notice or standby status provided the trial judge instructs the
1162 alternate jurors as to their duties and responsibilities during the
1163 deliberations of the jury. The court may discharge one or more
1164 alternate jurors at any time during the deliberations of the jury. If
1165 at any time after the submission of the case by the court to the jury
1166 for its deliberation upon a verdict, a juror is discharged by the court
1167 for any reason, the court shall direct the clerk or assistant clerk to
1168 place all of the names of the alternate jurors in a box or drum and
1169 to select at random the name of an alternate juror. The alternate
1170 juror so selected shall take the place of the discharged juror on the
1171 jury and shall participate fully in the deliberations of the jury. The
1172 jury, so constituted, shall begin its deliberations anew with full
1173 authority to render a verdict in the case. The court shall have

jurisdiction to receive the verdict of the jury, as constituted under the provisions of this Section, and shall have jurisdiction and authority to render judgment in the case. Whenever it is appropriate for the court to direct a verdict, the court may do so without first reducing the number of jurors to the proper number required for deliberation in the case. Upon a finding of cause, the trial judge may impanel a lesser number of jurors than specified under this Section. Nothing in this Section shall prevent the court from rendering a valid judgment based upon a verdict rendered by a fewer or greater number of jurors than required under this Section or based upon procedures other than specified in this Section where all parties have by stipulation agreed to the said number of jurors or the said procedures.

Section 72. Translators for Deaf Jurors; Duties and Responsibilities. A translator may assist a deaf juror during the juror orientation program, the juror's welcome, and the judicial discretion hearing. As a matter of discretion, the court may permit a translator to assist a deaf juror during the trial after a determination of the competency of the translator. In the presence of the jury, the court shall instruct the translator to make true, literal, and complete translations of all testimony and other relevant colloquy to the deaf juror to the best of his ability. The court may permit a translator to be present and assist a deaf juror during the deliberations of the jury. In the presence of the jury, the court shall instruct the translator to refrain from participating in any manner in the deliberations of the jury and to refrain from having any communications, oral or visual, with any member of the jury regarding the deliberations of the jury except for the literal translation of jurors' remarks made during deliberations. The verdict of the jury shall be valid notwithstanding the presence of the translator during deliberations.

Section 73. Special Jury Charge. Upon a motion of a party or whenever the court deems it appropriate, the court shall include in its charge to the jury an instruction which in substance states that no duly impanelled trial juror is better qualified to determine the truth of the facts in controversy or to deliberate upon a verdict solely because of his occupation or reputation. The court shall have discretion to express this instruction in whatever language it deems appropriate and to supplement, elaborate, or explain this instruction to the jury with reference to the particular case being submitted to it. This Section shall not be construed as a limitation in any way upon the court's authority to make such further charges as are appropriate.

Section 74. Wrongful Juror Selection; Penalty. Whoever is guilty of fraud in the processing or selecting of jurors or prospective jurors either by causing any name to be inserted into any list wrongfully, or by causing any name to be deleted from any list wrongfully, including wrongful data entry or the altering of any data processing machine or any set of instructions or programs which control data processing equipment for such wrongful purpose, shall have committed a crime, which, upon conviction, may be punished by a fine of not more than two thousand dollars. This Section shall not limit any other provisions of law concerning the crime of jury tampering.

Section 75. Preservation of Juror Records. All official records and papers compiled and maintained by the Office of Jury Commissioner shall be preserved for three years after the calendar year to which they apply. Official records shall include records in automated form on magnetic tapes and disks.

Section 76. Challenge of the Composition of the Juror Pool. A party may challenge the composition of the juror pool by a motion for appropriate relief. Such challenge may be made only on the ground that the composition of the juror pool does not represent a fair cross-section of the juror district from which the jurors were drawn. This challenge shall be made and decided before any individual juror is examined, unless the court orders otherwise. The challenge shall be in writing, supported by affidavit, and shall specify the facts and demographic data constituting the ground of the challenge. The challenge shall be tried by the court and may, within the discretion of the court, be decided on the basis of the affidavits filed with the challenge. Upon the trial of such a challenge, the witnesses may be examined on oath by the court and may be so examined by either party. If the challenge is sustained, the court shall discharge the entire juror pool.

Section 77. Irregularity in Selecting, Summoning, and Managing Jurors. Any irregularity in compiling any list of jurors or prospective jurors; or any irregularity in qualifying, selecting, summoning, confirming, postponing, excusing, cancelling, instructing, impanelling, challenging, discharging, or managing trial or grand jurors; or any irregularity in limiting any term of juror service, in length or other incident of the term; or the fact that an impanelled juror shall have been found to be not-qualified under Section 6 of this Chapter; or any defect in any procedure performed under this Chapter shall not be sufficient to cause a mistrial or to set aside a verdict unless objection to such irregularity or defect has been made as soon as possible after its discovery or after it should have been discovered and unless the objecting party has been specially injured or prejudiced thereby. Any summons or other notice sent under the authority of this Chapter shall be valid as long as the recipient has been given reasonable notice. Periods of notice set forth in this Chapter for such notices shall be for administrative purposes only; such periods shall be neither jurisdictional nor mandatory.

Section 78. Data Processing Equipment and Services. The use of data processing equipment, methods, services, forms, and electronic telecommunications systems by the Office of Jury Commissioner for the implementation and administration of this Chapter shall be authorized. The Office of Jury Commissioner may establish an on-line interactive data processing system in some or all of the participating counties. The Office of Jury Commissioner, with the approval of the Jury Management Advisory Committee and with authorized approvals of representatives of the executive branch, may share in the use of the Commonwealth's TELPAC telecommunications system or any other telecommunications system of the Commonwealth. The data processing center in the judicial branch, if possible, shall provide to the Office of Jury Commissioner without cost such data processing capacity, file storage, telecommunications equipment, systems software sup-

port, and related services and supplies, all with the highest priority access during regular court hours, as shall be adequate for the orderly development, implementation, and administration of this Chapter in all participating counties. In the event the data processing center is unable to provide such data processing services, the Office of Jury Commissioner may, with the approval of the Jury Management Advisory Committee, procure these data processing services and supplies, in part or full, from another governmental agency or from a private source, with or without the necessity of purchasing such services and supplies.

Section 79. Contractual Authority. The Jury Commissioner may, in accordance with applicable procurement laws and regulations of the Commonwealth, enter into contracts for purchasing or procuring services, equipment, forms, and supplies, including services from the United States Postal Service, as are necessary or appropriate for the implementation and administration of this Chapter.

Section 80. Acceptance of Grants. The Jury Commissioner, with the approval of the Jury Management Advisory Committee, may enter into contracts and agreements with, and accept gifts, grants, contributions, and bequests of funds from, any department, agency, or subdivision of federal, state, county, or municipal government, and any individual, foundation, corporation, association, or public authority for the purpose of providing or receiving services, facilities, staff assistance, equipment, and supplies in connection with any provisions of this Chapter or for the general improvement of the jury system of the Commonwealth or for the benefit of jurors generally or at a particular courthouse. Such funds shall be deposited with the State Treasurer and may be expended by the Office of Jury Commission in accordance with the conditions of such gift, grant, contribution, or bequest without specific appropriation.

Section 81. Requirements of Jury-trial Courts. Each court that receives jurors under this Chapter shall make a commitment of certain resources and good will for the efficient and courteous management of jurors. The court shall have a juror-pool room, jury boxes, deliberation rooms, and restroom facilities that are adequate in size, secure, clean, light, adequately heated and ventilated, and comfortable. An adequate full-time staff and emergency backup staff shall be specially trained and assigned to supervise jurors and to work cooperatively with and under the guidance of the Office of Jury Commissioner and the Jury Management Advisory Committee. The juror-pool staff shall be provided with reasonable secretarial services, postage, office supplies, and telephone service. The court and its staff shall attempt to improve juror utilization and management. Attendance, compensation, utilization, and management data shall be provided in a timely manner to the Office of Jury Commissioner. The court shall summon only the minimum number of jurors necessary, cancel jurors as soon as it has been determined that scheduled jurors are not needed, and discharge jurors as early in the day as possible after it has been determined that their services will not be required. The court and its staff shall take all reasonable steps to maximize jurors' security, comfort, and convenience while performing juror service including

but not limited to, the following: providing parking spaces for jurors where possible; providing separate juror entrances and exits where possible; providing safe and comfortable furniture for jurors; providing for adequate lunch and coffee breaks for jurors and arranging for food and beverages to be available for purchase by jurors during these breaks; providing reasonable access to telephones for jurors' personal and business needs; adopting special plans and procedures for sequestered jurors; establishing snow-emergency procedures; and handling juror inquiries and problems in a courteous and efficient manner. The court shall insure that jurors are properly oriented and welcomed. The court and its staff shall insure that jurors are reasonably informed of matters which are of proper concern to them. The court shall be willing to participate in research and other public-education programs to the extent possible.

Section 82. Severability Clause. If any provision of this Chapter or the application thereof is held invalid, such invalidity shall not affect other provisions or applications of this Chapter which can be given effect without the invalid provisions or application, and, to this end, the provisions of this Chapter shall be severable.

SECTION 2. Present members of the Jury Management Advisory Committee may continue to hold their offices without reappointment unless the Supreme Judicial Court deems it appropriate to do otherwise.

SECTION 3. The Jury Commissioner for Middlesex County, appointed under Chapter 415 of the Chapters and Resolves of 1977, may hold the Office of Jury Commissioner for the Commonwealth without specific reappointment until the expiration of his present term of office unless the Supreme Judicial Court deems it appropriate to do otherwise.

II. TRIAL COURT STATISTICS

- A. EVALUATION OF STATISTICAL DATA REPORTED BY THE TRIAL COURT**
- B. SUGGESTED STATISTICAL METHODOLOGIES**
 - 1. Disposition Analysis**
 - 2. Dispositions Per Week**
 - 3. Dispositions Per Judge**
 - 4. Pending Case Analysis**
 - 5. Age of Pending Caseload**
 - 6. Projected Workload Analysis**
 - 7. Weighted Caseload Analysis**
 - 8. Judicial Assistance**
- C. POLICY RECOMMENDATIONS FOR THE IMPROVEMENT OF STATISTICAL DATA**
- D. CONCLUSION**

II. TRIAL COURT STATISTICS

Proper judicial administration requires that important statistical information about the judicial system be reported on a regular basis. Many innovative techniques have been implemented since the courts were reorganized. The lack of statistical information available to the Trial Court makes it difficult to fully assess the effectiveness of these policies.

The public interest requires that the Trial Court have an adequate appropriation to prepare and publish statistical reports which demonstrate the accomplishments and needs of the judicial system. The dearth of manpower and the lack of modern computerized data gathering systems makes it difficult to obtain meaningful information about the performance of the judiciary. The legislature should fund the Office of Chief Ad-

ministrative Justice in a manner sufficient to allow for needed personnel and systems development.

The following is an evaluation of the statistical methods used by the Trial Court. No attempt has been made to assess the performance of any department. Instead, the analysis focuses on the statistical methods used in reporting caseload data. Information for this report is based on the statistics reported in the Annual Report of the Chief Administrative Justice of the Trial Court for 1980.

A. EVALUATION OF STATISTICAL DATA REPORTED BY THE TRIAL COURT

1. The District Court Department

The statistics for the District Court Department are reported through a series of charts. The first series of charts are summaries of the work of the department and are arranged under the headings of "Criminal," "Non-Criminal," and "Juvenile" each of which is further subdivided. These charts present the work of the department in the aggregate and include, in most instances, comparative figures for last year.

The summary report on criminal business distinguishes between "Criminal" and "Parking Violations." The statistics under criminal business are categorized by "Motor Vehicle Complaints," "All Other Complaints," "Total Criminal Complaints," "Total Criminal Complaints Disposed Of," and "Total Appeals to Jury Sessions." Future reports might include statistics concerning the number of cases, both motor vehicle and other criminal matters, pending at the close of the reporting year as well as the number of cases disposed of in each category. The charts would then reflect increasing or decreasing caseloads with respect to each category and with respect to each division. A further subdivision of the non-motor vehicle criminal statistics would define more precisely the nature of the pending caseload. Average time elapsed from case filing to final disposition might also be of interest.

The data concerning parking violations consists of "Tickets Returned," "Tickets Paid," "Complaints Issued," and "Complaints Disposed Of." An additional statistic reflecting the total number of complaints pending and the total number of cases terminated might also be of interest. The amount of money collected should also be included.

The summary report on non-criminal business is categorized according to "Civil," "Transfer Cases," "Petitions for Mental Commitments," "Summary Process," "Small Claims," "Supplementary Process Cases," and "URESAs." These headings are sub-categorized, for the most part, by entries and dispositions which reveal a trend in the development or reduction of the caseload. Statistics concerning the number of pending cases existing in each category would reveal the extent of a backlog, if any.¹ Information relating to the average time involved in processing each of the various types of cases would be helpful in small claims and URESA cases, as a delay here often leads to a denial of rights. Average processing time would also be helpful here as in other cases to determine the extent of backlog, if any. Statistics concerning the success of URESA actions in collection support obligations should also be included.

The summary report on juvenile business includes statistics on "Juvenile Delinquency," "Children in Need of Services," and "Care and Protection." Cases are divided, for the most part, into the number of complaints entered and disposed of. Again, average processing time would be useful in determining the existence of backlog, if any; trends can be determined from the data concerning entries and dispositions.

Summary Statistics for Jury of Six trials in the District Court Department appear in a series of four charts. The data is analyzed according to "Jury Trial Requests," "Dispositions," "Age of Active Caseload," and summary data including an analysis of the pending caseload. Statistics are reported for each division of the District Court Department conducting jury of six trials.

A second series of charts contains similar information. This information is extremely useful in analyzing the success of the jury of six system. This series indicates the portion of the business of the District Court Department handled by each of the sixty-nine divisions comprising of the five administrative regions within the Department.

¹ Court backlog is a common but misused term. A distinction must be made between delay resulting from trial preparation by an attorney after a case is filed and delay caused by the inability of a court to dispose of its caseload. Therefore, long delays between filing and disposition do not necessarily mean that the court is behind in its work. A more precise definition, measuring the delay attributable solely to court procedures, is required. The term backlog, as used in this report, means unacceptable delay. We make no judgment on whether existing delays, if any, are attributable to the courts as opposed to trial preparation by attorneys.

2. THE SUPERIOR COURT DEPARTMENT

The information for the Superior Court Department is presented in four charts. The first chart is a summary report of the "Criminal Caseload" for the period 1979 to 1980. The second chart reports for each division the "Changes in the Criminal Caseload" for fiscal year 1979 and fiscal year 1980. The third chart reports the "Civil Caseload." These charts indicate for each of the fourteen divisions: the number of cases pending at the start of the year, the new cases during the current year, the total yearly caseload, the number of cases disposed of, the number of cases pending at the end of the current year, the percentage change in the pending caseload, and the number of cases disposed of as a percentage of the cases entered.

Future editions should include information concerning the age of cases pending at the end of each year and the average length of time necessary to process a case. Furthermore, the number of cases disposed of without a trial should be shown. For criminal matters, the information should indicate the number of cases involving specified offenses and whether the case was disposed of by plea, before a jury, or before the court.

The fourth chart concerns work of the appellate division. The data presented here is adequate with the caveat that it should also indicate whether appeals disposed of are new or old, as well as the average time required to dispose of appeals.

The caseload statistics, reported by the Superior Court, include only summary data for the criminal and civil business of the department. Although informative, this aggregate data should be broken down by case type. Future reports should analyze the data in terms of the type of civil and criminal litigation brought before this department.

Ultimately, as with other departments, statistics revealing the number of cases disposed of per judge should be developed. A standard statistical format common to all departments should also be developed.

3. The Probate and Family Court Department

Information concerning the Probate and Family Court Department is presented in six tables. The first table reports aggregate figures of original entries for the past five years in eight

categories of cases, and expresses the change in absolute and percentage terms. The second table contains similar data for fiscal 1980, expressing it according to the workload of each of the fourteen divisions. The second table, however, also includes an indepth description of the manner in which these filings were disposed.

The third table is an aggregate of the monthly trial lists for each of the divisions according to eight categories, both contested and uncontested. The table also indicates the number of masters appointed and reports filed.

The fourth table shows the amount of money collected by each division during fiscal 1980. The fifth table contains similar information, reporting the department totals for these items for the past six years. The sixth table indicates the amount of money collected in fees by the divisions for probates, divorces and certificates and copies.

Statistics concerning the disposition of cases in this department are very informative. They provide an excellent data base for evaluating the performance of the Probate and Family Court Department. Future reports, however, should include statistics demonstrating the pending caseload, the time required to process cases and the age of the caseload. Including this information in future reports will not be difficult. At the present time, the Probate and Family Court Department records the age of the docket in its monthly report.

4. The Land Court Department

The statistics for the Land Court Department are reported in four charts. The first chart presents comparison figures concerning the increased caseload and the number of cases disposed of for the past five years. The chart also contains the caseload pending at the end of each year. Entries and dispositions for this five year period are graphically represented on a separate chart. A "pie" diagram compares entries for 1976 and 1980.

The fourth chart indicates for each of four categories the number of cases pending at the beginning and end of the year, the number of cases entered, and the number of cases disposed of during the year. The chart also reports the percentage increase in the pending caseload at the year's end and the dispositions of cases as a percentage of cases entered. This informa-

tion is useful, but it would be helpful to know what percentage of the cases pending at the start of each year are disposed of during the year and their age at disposition. In this way, a determination could be made of the accumulated caseload, if any, and whether it is increasing or decreasing.

The information presented in the report of the Land Court is useful. Future reports should include statistics which demonstrate the time required to process the various types of cases in the Land Court. In addition, the age of remaining pending cases should be reported. Again, an effort to achieve a standard statistical format common to all departments should be made.

5. Boston Municipal Court Department

Statistical information concerning the Boston Municipal Court Department is contained in a series of charts. Five of these charts report on criminal business. Four charts are devoted to the non-criminal caseload. A report on the appellate division is also included.

Two diagrams are used to analyze the fiscal 1980 criminal caseload. One diagram illustrates the caseflow of criminal entries and dispositions. Another chart represents fiscal 1980 criminal entries and dispositions in percentage terms. A comprehensive table of criminal dispositions is reported, covering a five year period. Entries for this five year period are also reported. Statistics for entries are sub-divided according to "Motor Vehicle Violations" (both criminal and decriminalized violations), "Domestic Relations" and "Other Criminal Complaints." A separate analysis of juries of six trials is also reported.

Non-criminal business for fiscal 1980 appears in a "pie" diagram. Specific statistical information on the non-criminal caseload for fiscal 1980 is also reported in a separate table. This chart analyzes the non-criminal caseload by entries and dispositions, categorizing cases according to "Civil Cases," "Transfer Cases," "Mental Commitments," "Summary Process," "Small Claims," "Supplementary Process (Civil)," "Supplementary Process (Small Claims)," and "URESA" cases. The report also contains an analysis of the civil caseload over a five year period. Entries and dispositions for this period are il-

lustrated in a bar graph. A comprehensive chart of civil entries for this period is also reported.

Statistics for the Appellate Division are reported on a separate chart, covering a five year period from 1976 to 1980.

This information is interesting and undoubtedly useful to anyone concerned with the administration of justice. It is desirable that such an approach be included in future editions of the statistics reported by other departments. This information, however, does not indicate the number of cases pending at the start of the year, or the progress which was made in disposing of them. If truly informed decisions regarding this department are to be made, it is imperative that such information be available. In the alternative, the average length of time required to process cases in each category would serve as a useful device for calculating the accumulated caseload once a determination of actual pending cases is made.

What has been said about the Criminal Report and Civil Report applies as well to the Report on Jury Sessions. The information that is included is categorized in such a way as to indicate how cases are being disposed of by this department.

A standard reporting system for the Boston Municipal Court Department and the District Court Department would seem to be in order.

6. The Housing Court Department

The data consists of a single table which reports new entries in each of the two divisions, and as a total for the department, in criminal, summary process, small claims and civil cases for each of the past five years.

Filings in the Housing Court Department for fiscal year 1980 are represented graphically in three pie diagrams, one for each division and one for the total department. The five year trend for entries in this department appears on a separate graph.

The statistics reported for this department are inadequate. There is no mention of the number or manner of dispositions. Future reports should include statistics on the number of pending cases at the beginning and end of each year, the age of these cases and the time required to process these cases. In addition, the civil and criminal caseload should be broken down by case type.

7. The Juvenile Court Department

The information regarding the Juvenile Court Department is presented in a table which categorizes the caseload of the department into two groups, "Complaints" and "Care and Protection." Complaints are analyzed in terms of "Juvenile Criminal", "Juvenile Delinquent", and "Children in Need of Service (CHINS)." Care and Protection cases are sub-divided according to "Complaints", "Children Represented", and "Judicial Determinations." A separate series of tables provides the same information for each of the four divisions.

Statistics for this department are also reported through a series of graphs. The first graph illustrates the five year trend in judicial determinations by this department. This information is also provided for each of the four divisions on separate graphs.

In the future, information regarding the number of pending cases and the progress in reducing them should be included. Likewise, information concerning the time necessary to process cases should be supplied. Finally, more specific data relating to the nature of the proceedings is necessary.

B. SUGGESTED STATISTICAL METHODOLOGIES

Adequate evaluation of the performance of the Trial Court Department requires that detailed statistical data be reported. The Judicial Council recommends that the following statistical methodologies be included in future reports of the Chief Administrative Justice of the Trial Court.

1. Disposition Analysis

Lack of data concerning the manner in which cases are disposed may be a significant deficiency in the statistical data. A complete understanding of the performance of the judiciary might be provided by this type of data.

Aggregate data on the dispositions of cases does not provide a clear indication of the Trial Court's work load. Certain types of cases may tend to be settled out of court while others may be prone to lengthy trials. It may be important to know how the different types of litigation are resolved. An example of the

type of information which should be included in future reports appears below.

CIVIL BUSINESS DISPOSITIONS

1. Jury Trial
2. Non-Jury Trial
3. Default
4. Dismissed/Withdrawn/Settled
5. Transferred
6. Other Manner of Disposition

The same type of analysis can be used for criminal business.

CRIMINAL BUSINESS DISPOSITIONS

1. Jury Trials
 - Acquitted
 - Convicted
 - Plea Bargained
 - Other Manner of Disposition
2. First Instance Jury Trials
 - Acquitted
 - Convicted
 - Plea Bargained
 - Other Manner of Disposition
3. Jury Waived Trials
 - Acquitted
 - Convicted
 - Plea Bargained
 - Continued Without A Finding
 - Dismissed
 - Other Manner of Disposition
4. Appeals to Jury of Six
 - Acquitted
 - Convicted
 - Mistrials

The suggestions mentioned above could provide guidelines for establishing a statistical analysis for the measurement of dispositions in the various Trial Court Departments. Modifications would be required for cases brought before the various specialized courts.

At the present time, the aggregate data reported for some departments is inadequate to this task. The Housing Court did

not report any data on the number of dispositions reached. A systems design program, however, would reveal if the above type of data was of key importance, or whether there were other areas of more pressing need.

2. Dispositions Per Week

An exact measurement of a court's productivity can be found by determining the average number of cases disposed of per week. This statistic can be calculated by dividing the total number of dispositions per year by the number of court weeks scheduled.

Court/Division	Weeks of Court Scheduled	Cases Disposed	Average Disposition Per Week
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This type of analysis should be performed for every division of every department in the Trial Court. In addition, the productivity of individual judges can be measured by calculating the average disposition per week per judge.

One advantage to this type of analysis is that it is simple to calculate. In most cases, this statistic can be derived from the data presently reported by the Trial Court.

3. Dispositions Per Judge

This statistical technique measures the average amount of dispositions per full time judge. Computation of this statistic can be based on aggregate data from each department or from data at the divisional level. The number of dispositions per judge is calculated by taking the number of cases disposed of and dividing it by the number of judges assigned.

Court/Division	No. of Cases Disposed	Number of Judges Assigned	Disposition Per Judge
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4. Pending Case Analysis

This methodology focuses on the number of cases “pending” before a court at the beginning of each year and at the end of each year. A decrease in the pending caseload indicates that a court has been able to dispose of new entries during that year as well as cases which were on the docket at the beginning of the year.

Presently, pending case statistics are reported for the Superior Court Department, Land Court Department and Jury of Six Trials in the District Court Department. It is imperative that this methodology be expanded to all departments as soon as possible.

Department/ Division	Beginning Pending	End Pending	Change	% Change
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5. Age of Pending Caseload

A second measure for determining court productivity is to measure the age of cases left on the docket at the end of the year. Examining the age of the docket also provides useful information about the processing time of various cases. With the exception of the Jury of Six Report from the District Court Department, there are no statistics detailing the age of cases on various court dockets.

The age brackets utilized in this type of analysis may vary according to case type. For example, dividing the criminal docket according to cases under 30 days, 31 to 60 days, 61 to 90 days, 91 to 120 days, and over 120 days is informative. Civil business, however, may require subdivision according to longer processing times, 0 to 90 days, 91 to 180 days, 181 to 360 days, 361 to 720 days, and over 720 days.

It is important to recognize that this statistical analysis does not necessarily indicate that a court is behind in its work. In some instances, it may be improper to measure the age of a case from the filing date. For example, delay in the initial stages of litigation may be the result of an attorney rather than the court. In this respect, measuring the time between a request for trial

and final disposition may be a more accurate indication of *court* delay.

It is imperative that the age of pending cases be reported for each department. Many departments currently report the age of their caseload in monthly reports to the Office of the Chief Administrative Justice. Therefore, it would not be difficult to include this information in the Annual Report of the Trial Court.

6. Projected Work Analysis

This statistic estimates the amount of judicial time that will be required to eliminate the pending caseload. The statistic is calculated by dividing the number of pending cases at the end of a term by the average number of cases disposed of per month.

$$\text{Projected Work (Months)} = \frac{\text{Number of Pending Cases}}{\text{Average Number of Cases Disposed of Per Month}}$$

The information provided by this analysis is very helpful to court planners. Once completed, the statistic provides an information base which aids in the assignment of judges.

The Trial Court does not report data on the amount of time required to eliminate pending caseloads. Future editions of the Trial Court Report should include this method of analysis for all divisions of the various Trial Court Departments.

7. Weighted Caseload Analysis

Measuring the number of filings per year does not provide a clear indication of the judicial work load. This method fails to consider the amount of time needed to dispose of these cases. Weighted caseload analysis takes into account the fact that certain types of cases require more time to process than others. For example, it may take less time to dispose of one hundred misdemeanor cases than it does to dispose of ten felony cases. The weighting of cases adjusts the cases filed to reflect the different amount of time required to process different types of cases.

Several states have implemented a weighted case system, using it for determining judicial assignments. These states calculate the number of bench hours required to hear different types of cases and how many bench hours are available per judge. Dividing the number of bench hours required by the available bench hours enables a court planner to determine the number of judicial positions required to dispose of these cases.

While weighted caseload analysis provides a measure of judicial work load, it may not be an accurate tool for assigning judges. The weight given to a particular type of case is based on the *average* time needed to reach a disposition. Since some judges work faster than others, the weight may not reflect the processing time of a specific judge. In order to avoid this problem, a weighted case index may have to be calculated for each judge. Such an approach, however, is extremely impractical.

This type of analysis may be useful in calculating the overall manpower needs of the judiciary. In this respect, weighted case analysis would not be used as a management tool for assigning judges. By estimating the judicial work load, the analysis provides the General Court with valuable information on whether additional judicial personnel are needed.

Computation of a weighted case system is extremely complex. The Trial Court should explore the efficacy of this technique, to determine what information might be of assistance if derived through the weighting process and what types of weighting would be relevant.

A preliminary investigation of weighted case analysis is currently being conducted in the District Court Department. The Council supports this investigation.

8. Judicial Assistance

Pursuant to G.L. Chapter 211B, §3, judges in the Trial Court may be assigned to sit on trials in a department or division other than their original appointment. Section 14 of Chapter 211B provides for the recall of retired judges. Judicial transfers between departments or divisions should be reported. Likewise, the number of recalled judges utilized by each department should be recorded.

Recording judicial transfers and recalled judges will isolate

those departments or divisions which require aid in disposing of cases.

Court/ Division	No. of Judges	Judge Days		Net Judge Days Received
		Given	Received	

This type of analysis will help judicial planning. Court planners will be able to use this analysis to determine future judicial appointments and assignments.

C. POLICY RECOMMENDATIONS FOR THE IMPROVEMENT OF STATISTICAL DATA

In order to improve the statistical reporting of the Trial Court, the Council recommends the following:

- 1. The legislature should insure funding of the Office of the Chief Administrative Justice of the Trial Court and the offices of the Chief Administrative Justice of each department adequate to the development of management personnel and resources for state of the art statistical gathering and data analysis.**

While some of the statistical techniques mentioned in this report can be calculated from available data, others will require a substantial change in the present methods of data compilation. The Trial Court must begin to develop a collection system which utilizes computer technology. Presently, data collection is based on a manual system. Without computers, improvements in statistical methods place an impossible administrative burden on court personnel. At the present time, the Trial Court simply does not have the personnel to gather and analyze statistical information.

It is imperative that the General Court provide sufficient funds for improved statistical gathering and reporting. Present fiscal limitations require the judiciary to deliver services quick-

ly and efficiently. The task cannot be accomplished without adequate information for managerial decision making. A more efficient judicial system will benefit the public by reducing the litigation expenses resulting from court delay. The Council believes that funding for improved statistical systems is a wise investment.

- 2. Using modern statistical methods and equipment, the Office of Chief Administrative Justice should develop statistical formats for public reporting and for management use, these formats may not necessarily be the same.**

The statistics contained in the Annual Report of the Chief Administrative Justice of the Trial Court are designed for public consumption. Most of the statistical data collected by the Trial Court, however, is used for planning purposes and is simply not reported.

The Council recognizes that the primary reason for statistical recording is to provide court planners with management information. Management data may require a different type of statistical analysis than public data. Accordingly, the Trial Court should begin to develop an analysis of judicial work loads for management purposes.

We believe, however, that a comprehensive statistical report should be made available to the public. Numerous bills are filed each year in the legislature which affect the judiciary. Some of these bills recommend changes in the jurisdiction of the various Trial Court departments. Moreover, legislation creating new statutory rights tend to confer jurisdiction in particular departments of the Trial Court. Unfortunately, many legislators are unable to reach an informed opinion on the judicial impact of this type of legislation. It is imperative, therefore, that members of the General Court have access to meaningful statistical information.

- 3. A single unified format should be designed, applicable to all departments, and this format should be able to measure individual judge production, as well as divisional and department performance.**

It is extremely difficult to compare the productivity of the various departments of the Trial Court. This is due to the fact

that each department utilizes a different statistical format. Uniform statistical formats should be developed which allow such a comparison.

The Council recognizes that statistical information cannot be exactly the same for all departments. Jurisdictional differences in the specialized courts may require a particular department to report its data in a slightly different manner. This is particularly true when reporting the manner of case dispositions. Basic statistical formats, however, should be developed. For example, all departments should report their pending caseload and the age of this caseload. Therefore, while the information contained in the reports will vary, the basic statistical format should remain the same for all departments.

At the present time, most of the statistics reported by the Trial Court analyze caseload data. In addition to this information, the Trial Court should begin to develop a uniform analysis of judicial workloads for all court departments. Unlike caseload data, work load statistics focus directly on judicial productivity. For example, instead of analyzing cases work load analysis examines the number of dispositions per month, dispositions per judge and judicial assistance.

Work load analysis is primarily a management statistic, providing valuable information to court planners. This type of data, however, also serves a public function. By providing an accurate indicator of judicial productivity, work load data allows legislators to reach informed conclusions on issues such as increasing the number of judicial positions.

D. CONCLUSION

One of the primary benefits to court reorganization is centralized management. It is impossible, however, to efficiently manage the judiciary without adequate information. While statistics reported by the Trial Court have improved during the past year, additional resources are required in order to make significant improvements in data collection and reporting. The legislature and the Trial Court should give this matter prompt attention.

III. JURISDICTION IN SPECIALIZED DEPARTMENTS OF THE TRIAL COURT

- A. REMOVAL OF EQUITY CASES FROM THE
PROBATE AND FAMILY COURT
DEPARTMENT
- B. ENLARGING THE EXCLUSIVE ORIGINAL
JURISDICTION OF THE LAND COURT
DEPARTMENT
- C. TRANSFER OF ACTIONS WITHIN THE
TRIAL COURT

A. REMOVAL OF EQUITY CASES FROM THE PROBATE AND FAMILY COURT DEPARTMENT

HOUSE . . . 1981 . . . No. 5774

AN ACT ELIMINATING THE RIGHT TO REMOVE EQUITY CASES FROM
THE JURISDICTION OF THE PROBATE AND FAMILY COURT DEPART-
MENT TO THE SUPERIOR COURT DEPARTMENT.

*Be it enacted by the Senate and House of Representatives in
General Court assembled, and by the authority of the same, as
follows:*

- 1 Section 6 of chapter 215 of the General Laws, as most recently
- 2 amended by section 55 of chapter 400 of the acts of 1975, is hereby
- 3 further amended by striking out the first paragraph and inserting
- 4 in place thereof the following paragraph: —
- 5 The probate and family court department shall have original
- 6 and concurrent jurisdiction with the supreme judicial court and

- 7 the superior court department of all cases and matters of equity
- 8 cognizable under the general principles of equity jurisprudence
- 9 and, with reference thereto, shall be courts of general equity
- 10 jurisdiction, except that the superior court department shall have
- 11 exclusive original jurisdiction of all actions in which injunctive
- 12 relief is sought in any matter growing out of a labor dispute as
- 13 defined in section twenty C of chapter one hundred and forty-nine.

The equity jurisdiction of the Probate and Family Court Department is conferred by section 6 of G.L. Chapter 215. This section has undergone several changes in recent years.

Traditionally, the Probate Court was not a court of general equity jurisdiction. The equity jurisdiction of the court was limited by statute to specific matters which were incidental to the probate business of the court.

In 1963, the General Court amended G.L. Chapter 215, §6 by inserting a new paragraph which invested this department with the power of general equity jurisdiction.

Probate courts shall have original and concurrent jurisdiction in equity with the supreme judicial and superior courts of all cases and matters of equity cognizable under general principles of equity, jurisprudence and, with reference thereto, shall be courts of general equity jurisdiction.¹

This new paragraph also provided for the automatic removal of equity cases from the Probate Court to the Superior Court.

[P]rovided, however, that in proceedings of which probate courts have jurisdiction in equity solely by reason of the provisions of this paragraph a petitioner, respondent or intervener may, after proper service has been made, within seven days after the return day of the initial action remove the case to the superior court.²

Although the 1963 amendment conferred general equity jurisdiction on the Probate Court, it retained the specific equity jurisdiction over subjects such as wills, trusts, decedents estates, guardianships and conservatorships. The specific grants of equity jurisdiction, included in the second paragraph

¹ 1963 Mass. Acts ch. 820, §1. The Superior Court retained exclusive equity jurisdiction over suits for injunctive relief in labor disputes under G.L. Ch. 149, §20C.

² *Id.* See also 1973 Mass. Acts Ch. 1114, §63. (deleting the word "solely" from this provision.)

of the 1963 amendment are now found in the second paragraph of section 6 of G.L. Chapter 215.³

The difference between the grant of general equity jurisdiction, as contained in the first paragraph of section 6, and the traditional equity jurisdiction, as contained in the second paragraph of that section, is extremely important. The right of removal from the Probate Court to the Superior Court is limited to equity cases which fall within the general equity provisions of the first paragraph of section 6 of G.L. Chapter 215. There is no right of removal for traditional equity cases commenced pursuant to the second paragraph of section 6 of G.L. Chapter 215.⁴

It is important to recognize that the right to remove cases falling within the general equity jurisdiction of the Probate Court was the result of a legislative compromise. The General Court apparently intended that equity practice in both the Probate and Superior Court be "as closely similar as possible."⁵ There was a fear, however, that probate judges lacked experience in deciding equitable issues which were not part of their traditional business. The Council, commenting on a bill similar to House No. 5774, stated:

[T]he bill . . . would dilute the jurisdiction of the superior court of general jurisdiction throughout the commonwealth by spreading it to twenty-two probate judges in 14 counties and thus invading the general equity jurisdiction of the superior court with judges lacking the responsible experience, without supervision of the Chief Justice of the superior court, in that field of unlimited variety of facts and law requiring the broadest legal learning available and experienced judgment in its application.⁶

When the legislature enlarged the equity jurisdiction of the Probate Court, it created a right of removal in order to provide litigants an opportunity to have their cases brought before a more experienced judge in the Superior Court.

The automatic removal of general equity cases from the Probate Court can no longer be justified. The Probate and Family

³ See 1975 Mass. Acts Ch. 400, §55. (specific jurisdictional grants added to the second paragraph without altering the substantive provisions thereof.)

⁴ *Sebastian v. Carroll*, 353 Mass. 465, 468 (1968).

⁵ *Wood v. Wood*, 369 Mass. 665, 669 (1976); *Anderson v. Anderson*, 354 Mass. 565, 567 (1968).

⁶ Thirty Sixth Report, Judicial Council (1960) Pub. Doc. 144, p. 56-57.

Court Department has a distinguished record in equity jurisprudence.

Removal of equity cases brought pursuant to the first paragraph of G.L. Chapter 215, §6 serves no useful purpose. On the contrary, removal increases the cost of litigation and contributes to unnecessary delay.

House No. 5774 amends the first paragraph of section 6 of G.L. Chapter 215 by eliminating the automatic right to remove cases over which the Probate Court exercises general equity jurisdiction.⁷ Accordingly, the bill eliminates the present distinction between general equity jurisdiction and traditional equity jurisdiction in the Probate and Family Court Department. In both instances, there will be no automatic right of removal to the Superior Court Department. A majority of the Council believes that this amendment to section 6 of G.L. Chapter 215 would benefit the judiciary and the public.

B. ENLARGING THE EXCLUSIVE ORIGINAL JURISDICTION OF THE LAND COURT DEPARTMENT

SENATE . . . 1981 . . . No. 958

AN ACT TO EXPAND THE EXCLUSIVE ORIGINAL JURISDICTION OF THE LAND COURT.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 Section 1 of Chapter 185 of the General Laws as appearing
- 2 in the Tercentenary Edition is hereby amended by adding af-
- 3 ter subsection (a) thereof the following subsection: —
- 4 Subsection (a ½) Any petition or civil action affecting
- 5 registered land.

⁷ The same bill has also been filed in the Senate, Senate No. 1856.

The Land Court Department is a specialized court with its jurisdiction limited by the provisions of G.L. Chapter 185, §1. This section divides the jurisdiction of the court into two categories: exclusive original jurisdiction and concurrent original jurisdiction in equity.

Petitions for the registration of title to land fall within the exclusive original jurisdiction of the Land Court. *See* G.L. Chapter 185, §1(a). This is consistent with the Court's responsibilities to administer the registration system pursuant to the Land Registration Act of 1898. The purpose of this Act, now G.L. Chapter 185, is to provide a system for making titles certain and indefeasible so that anyone dealing with the property can be sure that interests in the property are recorded on a certificate of title.

A person desiring to register title to land must follow an exacting procedure. The registration petition contains a description of the land, petitioner's marital status, names and addresses of adjoining land owners, deeds and a plan of the land. The court may also require a new survey of the land usually at the petitioners expense. Once a petition is filed, the court appoints a title examiner who conducts a title examination of the property and files a report with his opinion of the title. If the report is favorable, the court recorder sends notice, by mail, to all interested parties and publishes the notice in the newspaper. Upon a finding that the petitioner has title, the Land Court enters a decree of conformation and registration. This decree is binding on all the world. All encumbrances, with the exception of certain claims by the government, are recorded on the certificate of title.

The above mentioned procedures provide adequate protection for persons with conflicting interests. The independent title examination insures that the boundaries are accurate. Parties are given ample notice of the proceedings and may file an answer with the Land Court contesting the registration.

In addition to the safeguards contained in the registration process, an aggrieved party may seek review of a registration in collateral proceedings. An example of this is a claim for the fraudulent registration of land. Section 45 of Chapter 185 allows an individual who is deprived of his land, by a decree of registration obtained through fraud, to file a petition for review within one year after entry of the decree. Even if a peti-

tion for review is not brought within one year, the land may become subject to a constructive trust under §75 of Chapter 185.¹

While the Land Court is able to monitor the registration system during the process of registration, it does not have the exclusive authority to review registration decrees in subsequent proceedings. Collateral attacks on decrees of registration may be commenced in other departments of the Trial Court.

Senate No. 958 would change the jurisdiction of the Land Court by giving it exclusive original jurisdiction over any civil action affecting registered land. The language of this bill is admittedly broad. Although the bill encompasses many types of actions, it appears that the primary focus of the bill is to provide the Land Court with exclusive jurisdiction over proceedings which seek to collaterally attack registration decrees. For example, the mere attachment of registered land in a tort action would not give the Land Court the authority to decide the tort action itself.

The Land Court is an integral part of the registration process. Over the years, the court has developed an expertise in this area of law. By exercising exclusive jurisdiction over registration petitions, the Land Court is able to provide consistent interpretations of the Land Registration Act, G.L. Chapter 185. This serves to enhance the certainty of titles to registered land.

The Council supports Senate No. 958. The Land Court was established in part to administer the land registration system in the Commonwealth. It is inconsistent to give the Land Court exclusive original jurisdiction over registration petitions and at the same time allow collateral proceedings to be brought in other departments. This is especially true given the fact that the Land Court specializes in this area of law. If the court is to properly administer the registered land system, it should be given complete authority to decide cases which affect registered land.

Expanding the exclusive jurisdiction of the Land Court in this area will improve the efficiency of the registration system. Since the court has already heard the petition for registration, it is already familiar with factual issues which may be raised in

¹ See *Kozdras v. Land Vest Properties, Inc.*, 1980 Mass. Adv. Sh. 2409 (collateral attack on registration decree).

subsequent proceedings. Giving the Land Court exclusive jurisdiction to hear collateral attacks on registration decrees will enhance the certainty of registered land titles by providing uniform interpretation of G.L. Chapter 185. We, therefore, recommend the enactment of Senate No. 958.

C. FACILITATING THE TRANSFER OF ACTIONS WITHIN THE TRIAL COURT

SENATE . . . 1981 . . . No. 691

AN ACT TO FACILITATE THE TRANSFER OF ACTIONS WITHIN THE TRIAL COURT.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 6 of Chapter 215 of the General Laws as
2 amended is hereby amended by adding the following sentence
3 at the end thereof: —

4 The Probate and Family Court may upon application of
5 either party or on its own motion transfer to the Land Court
6 Department any civil action in which any right, title or interest
7 in land is involved.

1 SECTION 2. Section 15 of Chapter 185 is hereby amended by
2 striking the last paragraph thereof and inserting in place
3 thereof the following: —

4 The Land Court may, upon application of either party or
5 upon its own motion, transfer to the Superior Court Department
6 or Probate and Family Court Department any civil action
7 which is not set forth in section one as being within the
8 exclusive original jurisdiction of the Land Court.

Although court reorganization unified all the Trial Courts for administrative purposes, it did not eliminate the exclusive jurisdiction of the Land Court Department and the Probate Court Department. The jurisdictional limitations of the Land Court Department appear in section 15 of Chapter 185. The

jurisdiction of the Probate and Family Court Department is established in section 6 of Chapter 215.

Presently, cases not falling within the statutory grants of jurisdiction of these specialized courts must be dismissed. This policy is inconsistent with the goals of unification.

A superior policy is to have cases *transferred* to the appropriate court department as opposed to dismissal. Dismissal of cases on technical jurisdictional grounds increases the cost of litigation and creates public dissatisfaction with the judiciary. It is inconsistent to have a system which allows judicial transfers from one department to another, but does not allow the transfer of litigation.

Senate No. 691 provides for the transfer of cases between the various departments of the Trial Court. We believe that this bill should be enacted.

IV. TECHNICAL IMPROVEMENTS IN THE LAND COURT DEPARTMENT

- A. IMPROVING LAND REGISTRATION PROCEDURES
- B. EXPEDITING RECOVERY FROM ASSURANCE FUND
- C. ESTABLISHING A TITLE INTEGRITY COMMISSION
- D. IMPROVING THE STORAGE OF LAND RECORDS
- E. CONFORMITY OF LAND COURT RULES WITH THE MASSACHUSETTS RULES OF CIVIL PROCEDURE

A. IMPROVING LAND COURT REGISTRATION PROCEDURES

SENATE . . . 1981 . . . No. 696

AN ACT TO EXPEDITE THE REGISTRATION OF LAND.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 SECTION 1. Section 12 of Chapter 185 of the General Laws
- 2 is hereby amended by inserting after the first sentence, as ap-
- 3 pearing in Section 87 of Chapter 478 of the Acts of 1978, the
- 4 following sentence: —
- 5 In addition he shall appoint attorneys at law to be known

6 as "land court examiners" who shall be assigned such duties
7 as the court may direct and payment for whose services shall
8 be the responsibility of the petitioner in any matter to which
9 they are assigned.

1 SECTION 2. Section 24 of said Chapter 185 is hereby amend-
2 ed by inserting before the word "examiners," as appearing in
3 line 2 of the Tercentenary Edition, the words: — Land Court.

1 SECTION 3. Section 27 of said Chapter 185 is hereby amend-
2 ed by striking out, in line 3 as appearing in the Tercentenary
3 Edition, the word "petitioner" and inserting in place thereof
4 the following words: — recorder, at the expense of the peti-
5 tioner.

1 SECTION 4. Section 33 of Chapter 185 is hereby amend-
2 ed by striking out the first three sentences, as appearing in the
3 Tercentenary Edition, and inserting in place thereof the fol-
4 lowing sentence: —

5 The petitioner shall file with the complaint a plan of the
6 land drawn in accordance with the land court regulations.

1 SECTION 5. Said Chapter 185 is hereby further amended by
2 inserting after Section 33 the following new section: —

3 *Section 33A.* The petitioner shall file with the complaint a
4 land court examiner's report of title on such forms as the
5 court may prescribe concluding with a certificate of his opin-
6 ion upon the title. The land court examiner shall be desig-
7 nated by the petitioner from a list of land court examiners
8 maintained by the land court department. Said examiner shall
9 search the records and investigate all facts stated in the com-
10 plaint or otherwise brought to his notice concluding with the
11 above mentioned certificate of his opinion. The report shall
12 be at the expense of the petitioner.

1 SECTION 6. Said Chapter 185 is hereby amended by striking
2 out Section 37 as most recently amended by Section 1 of Chap-
3 ter 151 of the Acts of 1977.

1 SECTION 7. Section 38 of said Chapter 185 is hereby amend-
2 ed by striking out the first sentence as amended by Section 2
3 of Chapter 151 of the Acts of 1977 and inserting in place there-
4 of the following sentence: —

5 Upon filing, the recorder shall immediately cause notice of
6 the filing of the complaint to be published in a newspaper pub-
7 lished in the district where any part of the land lies.

1 SECTION 8. Said Chapter 185 is hereby further amended by
2 striking out Section 43, as amended by Section 90 of Chapter
3 478 of the Acts of 1978 and inserting in place thereof the fol-
4 lowing section: —

5 *Section 43.* If in any case, an appearance is entered and
6 answer filed, the case shall be set down for hearing on the
7 motion of either party or at the direction of the court, but a

8 default and order shall first be entered against all persons who
9 do not appear and answer, in the manner provided in the pre-
10 ceding section. The court may refer the case or any part
11 thereof to one of the land court examiners, as master, to hear
12 the parties and their evidence and make report thereof to the
13 court. His report shall have the same effect as that of a
14 master appointed by the superior court in equity, and he shall
15 proceed according to the rules of said court applicable to
16 master, except as the same may be modified by the rules of
17 the land court department. The compensation of a master
18 appointed under this section, shall be awarded by the land
19 court department and shall be paid by the commonwealth,
20 except that compensation may be awarded by the court in its
21 discretion as a part of the taxable costs of the proceedings, in
22 which case the compensation shall be paid as decreed by said
23 land court department.

In recent years, several bills have been filed in the legislature which would have changed the procedures for registering land pursuant to Chapter 185. Legislative changes in registration procedures should be carefully examined. The legislature should avoid policies which reduce the initial expense of registration only to increase the cost in the long run by creating uncertainties in land titles. There are, however, several minor changes which can be made without lowering the standards of present registration procedures.

The initial step in the registration process is the filing of a petition (complaint) for the registration of title. After the filing of a petition, the court appoints a title examiner. See G.L. Ch. 185, §§12, 37. Because of heavy work loads, it may take months before the title examination is completed.

Senate No. 696 reduces the delay associated with this procedure. Petitioners would be able to request a "Land Court Examiner" to prepare an abstract *prior* to the filing of a registration petition, and would no longer have to wait until *after* a petition is filed in order to arrange for a title examination. Under the bill, the "Land Court Examiner's" report will be filed with the petition for registration.

In situations where registration is contested, G.L. Chapter 185, §43 provides that the case shall be set down for a hearing on the motion of either party. This section also allows the court to refer the case to a title examiner who serves as a master. Senate No. 696 amends section 43 by providing that the court, on its *own* motion, can set the date for a hearing. The bill also allows the court to appoint the new "Land Court Examiners"

to serve as masters. By allowing the *court* to set the hearing date and appoint a "Land Court Examiner" as master, Senate No. 696 reduces the delay in this procedure.

Due process requires that all interested parties be given sufficient time to respond. Since the "Land Court Examiner's" report is filed with the petition for registration, notice can be given immediately.

The Land Court has established strict regulations for the preparation of plans that accompany a petition for registration. At the present time, however, these regulations have no specific statutory foundation. Senate No. 696 would give these regulations a statutory basis.

We believe that Senate No. 696 should be enacted. The procedural changes made by this bill will reduce some of the delays existing under present procedures, while maintaining the high standards of the Land Court Department.

B. EXPEDITING RECOVERY FROM THE ASSURANCE FUND

SENATE . . . 1981 . . . No. 694

AN ACT CONCERNING THE ASSURANCE FUND OF THE LAND COURT.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 Section 101 of Chapter 185 of the General Laws, as appear-
- 2 ing in the Tercentenary Edition, is hereby amended by strik-
- 3 ing said section and inserting in place thereof the following
- 4 section: —
- 5 A person who, without negligence on his part, sustains loss
- 6 or damage, or is deprived of land or of any estate or interest
- 7 therein after the original registration of land, by the registra-
- 8 tion of another person as owner of such land or of any estate
- 9 or interest therein, through fraud or in consequence of any
- 10 error, omission, mistake or misdescription in any certificate
- 11 of title or in any entry or memorandum in the registration
- 12 book, may recover in contract in the superior court depart-

13 ment compensation for such loss or damage or for such land
14 or estate or interest therein from the assurance fund. This
15 section shall not deprive the plaintiff of any action of tort
16 which he may have against any person for such loss or dam-
17 age or deprivation of land or of any estate or interest therein.
18 If the plaintiff elects to pursue remedies both in contract and
19 tort and the plaintiff recovers in contract against the assur-
20 ance fund prior to the result in the action of tort, then the
21 commonwealth shall be subrogated to the rights of the plain-
22 tiff against any such person in the action of tort pursuant to
23 section one hundred and five of this chapter.

The assurance fund is an integral part of the registered land system in the Commonwealth. *See* G.L. Chapter 185, §99 et seq. The fund was established to compensate individuals who sustained a loss of property or damage as a result of land registration. A person is permitted to recover against the fund where, without negligence on his part, he sustains a loss or damage in consequence of any error, mistake or misdescription of any certificate of title.¹

According to section 101 of Chapter 185, a person so damaged has an action in contract against the fund. This contract action is brought against the state treasurer in Superior Court. A plaintiff may also seek recovery from other responsible individuals by filing a tort action. An action may also be commenced against the state treasurer and other individuals as joint defendants. *See* G.L. Ch. 185, §102. Where judgment is entered against the state treasurer and others as joint defendants, execution shall be levied upon the other defendants. *See* G.L. Ch. 185, §103. If the judgment remains unsatisfied, then the state treasurer is required to pay any deficiency out of the assurance fund. In situations where judgment cannot be entered against other defendants, it may be entered against the state treasurer alone. Section 105 of G.L. Chapter 185 provides that where payment has been made by the state treasurer, the Commonwealth is subrogated to the rights of the plaintiff against any other parties or securities.

As presently written, section 101 of Chapter 185 requires that a plaintiff first exhaust his judicial remedies against other possible defendants before proceeding in an action of contract against the assurance fund. Section 101 reads in part:

¹ *Overly v. Treasurer & Receiver General*, 344 Mass. 188, 194 (1962).

[B]ut a person so deprived of land or of any estate or interest therein, having a right of action or other remedy for the recovery of such land, estate or interest, shall exhaust such remedy before resorting to the action of contract herein provided.

This section also provides that if a plaintiff elects to pursue his remedy in a tort action and also brings an action of contract against the fund, the action of contract is continued until the disposition of the action in tort.

Senate No. 694 amends section 101 of G.L. Chapter 185 by eliminating the above mentioned provisions. Under the bill, a person who sustains loss or damage, without negligence on his part, may recover in contract in the Superior Court against the fund. There is no need to exhaust judicial remedies against all other defendants. The bill also provides that if the plaintiff elects to proceed against other defendants in tort as well as bring an action in contract against the assurance fund, he does not have to wait until the conclusion of the tort action before proceeding against the fund. In situations where the plaintiff recovers in contract from the fund before disposition of the tort action, the Commonwealth becomes subrogated to the rights of the plaintiff against the other defendants. Recovery is then possible pursuant to the subrogation provisions of section 105 of G.L. Chapter 185.

Requiring plaintiffs to exhaust judicial remedies against other defendants serves no useful purpose. Since the Commonwealth becomes subrogated to the rights of the plaintiff upon payment from the fund, there is no need to delay the disposition of the contract claims against the state treasurer.

The Council believes that Senate No. 694 should be enacted. This bill will not adversely affect the economic viability of the assurance fund and will reduce the delay currently associated with this type of litigation.

C. ESTABLISHING A TITLE INTEGRITY COMMISSION

SENATE . . . 1981 . . . No. 689

AN ACT TO ESTABLISH A TITLE INTEGRITY COMMISSION IN THE LAND COURT.

*Be it enacted by the Senate and House of Representatives in
General Court assembled, and by the authority of the same, as
follows:*

1 Chapter 185 of the General Laws, as most recently amended
2 by Chapter 478 of the Acts of 1978, is hereby further amended
3 by adding the following section: —

4 *Section 119.* There is hereby established within the land
5 court department of the trial court, but in no manner subject
6 to the control of the land court department, a title integrity
7 commission, consisting of five members experienced in title
8 examination and evaluation appointed by the administrative
9 justice of the land court department, who shall be designated
10 in their initial appointments to serve respectively for two,
11 three, four, five and six years from the date of appointment.
12 Upon the expiration of the term of office of a member, a
13 successor shall be appointed in the manner aforesaid for six
14 years. The commission shall elect a chairman and a vice
15 chairman who shall serve at the pleasure of the commission.
16 Members of the commission shall serve without pay but shall
17 be reimbursed for all necessary expenses related to the carry-
18 ing out of their duties and obligations as members of the
19 commission.

20 The commission shall act as a clearinghouse for informa-
21 tion about risks affecting land titles, whether registered or
22 unregistered, their relative importance and frequency of occur-
23 rence, and ways of reducing them, and for information about
24 programs and proposals relating to improvement of public
25 services of land title recording and registration in the com-
26 monwealth, and may advise the general court, municipalities,
27 state and local public agencies as to the possible direct and
28 indirect effect on titles, title assuring processes and real estate
29 transactions in the commonwealth of proposed or existing leg-
30 islation or regulations. It may seek information about titles
31 from conveyancers, title insurance companies and other public
32 or private sources and may gather and release such informa-
33 tion in ways not disclosing the identity of properties or

34 sources of such information. The commission may provide
35 information and technical assistance to the Massachusetts Con-
36 veyancers Association in the preparation of title standards.

37 The commission may accept grants, donations, gifts, loans
38 of funds, and contributions in money, services, or otherwise
39 from the United States or any of its agencies, from the com-
40 monwealth or any of its agencies, or from any other source,
41 public or private, and use or expend such moneys, services or
42 other contributions as may be received by it for its purposes.
43 The commission shall submit an annual report to the general
44 court and its recommendations, if any, together with drafts
45 of legislation necessary to carry such recommendations into
46 effect, by filing the same with the clerk of the house or the
47 senate on or before the last Tuesday of December in every
48 year and shall file its annual report, along with an accounting
49 of funds received and expended not later than the last Wednes-
50 day of December in every year.

Establishment of a commission to evaluate the risks affect-
ing land titles is a step towards the improvement of land rec-
ords in the Commonwealth. The commission, as embodied in
Senate No. 689, is empowered to act as a clearing house for in-
formation concerning land titles. In addition, the commission
is authorized to recommend legislation which will improve the
land title recording system.

Last year we recommended that a similar commission be
established under the auspices of the Land Court Department.
See Fifty-Sixth Report, Judicial Council (1979) Pub. Doc. No.
144, p. 72-73. The Council believes that the commission estab-
lished by Senate No. 689 would benefit both practitioners and
the public and, therefore, recommend its enactment.

D. IMPROVING THE STORAGE OF LAND RECORDS

SENATE . . . 1981 . . . No. 693

AN ACT TO FACILITATE THE STORAGE OF INFORMATION BY ELECTRONIC AND OTHER METHODS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 185 of the General Laws, as most recently amended by Chapter 478 of the Acts of 1978, is hereby further amended by adding after Section 48 the following section: —

Section 48A. Notwithstanding any other provision of this chapter, the register of deed, as assistant recorder with the permission of the Chief Justice of the Land Court Department of the Trial Court, may use a microphotographic, electronic, mechanical, magnetic or other comparable information storage facility capable of converting information stored and entered therein into legible type or print by mechanical or other means. In any registry of deeds which uses such a facility, any information which is required by this chapter to be indexed or which is required to be or noted in an entered entry book and any certificate of title or memorandum pertaining thereto which is required to be transcribed, entered, registered, noted or made in a registration book, by the assistant recorder, may, in lieu thereof, be indexed, entered, noted, transcribed, registered or made in one or more of such information storage facilities. The assistant recorder may designate a date upon and after which such record of any entry, certificate of title, or memorandum so entered and stored in said facility and verified by him shall be deemed to be the original entry, certificate of title or memorandum, and thereafter any copy or printout thereof, duly certified under the signature of the assistant recorder and sealed with the seal of the court, including an owners' duplicate certificate of title, shall be received as evidence in all courts of the commonwealth, and shall in the case of certificates of title be conclusive as to all matters contained therein, and as to other documents evidence of the contents thereof.

Nothing in this section shall relieve the register of deeds to the requirements imposed by Chapter 36 Section 15 of the General Laws regarding duplicate copies of records.

Presently, certificates of title and all necessary documents relating to Land Court titles are recorded in books and files in the registries of deeds. While this system has been extremely successful, new and improved methods of recording should be explored.

Senate No. 693 is another step towards the modernization of land records. The bill provides that the assistant recorder *may* use microphotographs, electronic or other comparable means for the storage of Land Court records. In order to utilize these systems, however, the assistant recorder must receive the approval of the Chief Justice of the Land Court Department. Under this bill, information presently required to be indexed and placed in an entry or registration book pursuant to G.L. Chapter 185, may be filed in a new system.

Assistant recorders would be empowered by the bill to establish a date by which any entry in the new system will be admissible as evidence. In the case of certificates of title, any copy or print-out from the system will be conclusive as to all matters contained therein.

Establishment of new storage facilities will significantly decrease the amount of space needed to keep Land Court records. In addition, new procedures may eventually lead towards the automation of these records.

E. CONFORMITY OF LAND COURT RULES WITH THE MASSACHUSETTS RULES OF CIVIL PROCEDURE

SENATE . . . 1981 . . . No. 695

AN ACT BRINGING THE LAND COURT IN CONFORMANCE WITH THE
MASSACHUSETTS RULES OF CIVIL PROCEDURE.

*Be it enacted by the Senate and House of Representatives in
General Court assembled, and by the authority of the same, as
follows:*

1 SECTION 1. Section 1 of Chapter 185 of the General Laws, as
2 most recently amended by Section 81 of Chapter 478 of the
3 Acts of 1978 is hereby amended by striking out the title, the
4 first paragraph and paragraph (a) and inserting in place
5 thereof the following: —

6 *Section 1.* The land court department established under
7 Section one of Chapter two hundred and eleven B shall be a
8 court of record, and whenever the words “land court”, or
9 wherever in this chapter the word “court” is used in that con-
10 text, they shall refer to the land court department of the trial
11 court and the words “judge of the land court” or the word
12 “judge” in context, shall mean an associate justice of the trial
13 court appointed to the land court department. The land court
14 department shall have exclusive original jurisdiction of the fol-
15 lowing matters: —

16 (a) Complaints for the confirmation and registration and
17 complaints for the confirmation without registration of title
18 to land and easements or rights in land held and possessed
19 in fee simple within the commonwealth, with power to hear
20 and determine all questions arising upon such complaints, and
21 such other questions as may come before it under this chap-
22 ter, subject to all rights to jury trial and of appeal provided
23 by law. The proceedings upon such complaints shall be pro-
24 ceedings in rem against the land, and the judgments shall
25 operate directly on the land and vest and establish title there-
26 to. A certified copy of the judgment of confirmation and
27 registration shall be filed and registered in the registry dis-
28 trict or districts where the land or any portion thereof lies,
29 as provided in Section forty-eight, and a certificate of title
30 in the form prescribed by law shall be issued pursuant thereto.
31 Immediately upon the entry of a judgment of confirmation

32 without registration, the recorder shall cause a certified copy
33 of the same to be recorded in the registry of deeds for the
34 district or districts where the land or any portion thereof lies,
35 and thereafter the land therein described shall be dealt with
36 as unregistered land.

1 SECTION 2. Said Section 1 of said Chapter 185 is hereby
2 further amended by striking the word "petitions" as it ap-
3 pears in paragraph (e) (f) (g) (h) (i) (j) (j½) and insert-
4 ing in place thereof the word: — complaints.

1 SECTION 3. Section 7 of said Chapter 185, as amended by
2 Section 86 of Chapter 428 of the Acts of 1970, is hereby fur-
3 ther amended by striking in the first sentence the word "peti-
4 tion" and inserting in place thereof the word: — "complaint."

1 SECTION 4. Section 15 of Chapter 185 as last amended by
2 Chapter 417 of the Acts of 1975, is hereby amended by strik-
3 ing out the third sentence thereof and inserting in place there-
4 of the following sentence: —

5 "In all other actions the defendant with his answer or a
6 plaintiff within ten days after the time limited by law for
7 filing an appearance and answer, or within ten days after the
8 time allowed by the court for filing an answer, may claim a
9 trial by jury."

10 and in the eighth sentence by striking the word "decree" as
11 it appears twice in that sentence and inserting in place thereof
12 the word "judgment."

1 SECTION 6. Section sixteen of Chapter 85, as most recently
2 amended by Section 1 of Chapter 506 of the Acts of 1910 is
3 hereby amended by striking the word "decree" as it appears
4 throughout said Section and inserting in place thereof the
5 word: judgment.

1 SECTION 7. Section 22 of Chapter 185 as appearing in Sec-
2 tion 2 of Chapter 448 of the Acts of 1904 is hereby amended
3 by striking in the first sentence the word "petitions" and in-
4 serting in place thereof the word: complaints.

1 SECTION 8. Section 23 of Chapter 185, as most recently
2 amended by Section 29 of Chapter 1114 of the Acts of 1973 is
3 hereby amended by striking the words "or decrees."

1 SECTION 9. Section 26 of Chapter 185, as most recently
2 amended by Section 2, Chapter 423 of the Acts of 1971 is
3 hereby amended by striking the present section and inserting
4 in place thereof the following: —

5 Section 26. Complaints for registration of title may be made
6 by the following persons: —

7 First. Persons who claim, singly or collectively, to own the
8 legal estate or easements or rights in land held and possessed
9 in fee simple.

10 Second. Persons who claim, singly or collectively, to have

the power of appointing or disposing of the legal estate or easements or rights in land held and possessed in fee simple.

Third. Infants and other persons under disability, by their legally appointed guardians; but the person in whose behalf the complaint is made shall be named as plaintiff.

Fourth. Corporations, by any officer duly authorized by a vote of the directors.

One or more tenants for a term of years which is regarded as a fee simple in Section one of Chapter one hundred and eighty-six, shall not bring an action except jointly with those who claim the reversionary interest which makes up the fee simple at common law; nor shall a mortgagor, except as hereinafter provided, bring an action without the written consent of the mortgagee; nor shall one or more tenants bring an action who claim undivided shares less than a fee simple in the whole land described in the complaint for registration. If the holder of a mortgage does not consent to the complaint, it may be entered nevertheless, and the title registered, subject to the mortgage, which may be dealt with or foreclosed as if the land subject to it has not been registered. The judgment of registration in such case shall describe the mortgage, and shall state that it has not been registered and that registration is made subject to it, and shall provide that no subsequent certificate shall be issued and no further papers registered relative to such land after a foreclosure of such mortgage.

SECTION 10. Section 26A of Chapter 185, as appearing in Section 2 of Chapter 457 of the Acts of 1931 is hereby amended by striking the section and inserting in place thereof the following: —

Section 26A. Complaints for the confirmation of title without registration may be made by the following persons: —

First. Persons who claim, singly or collectively, to own a legal estate or easement or right in land held and possessed in fee simple.

Second. Persons who claim, singly or collectively, to have the power of appointment or disposing of a legal estate or easement or right in land held and possessed in fee simple.

Third. Infants and other persons under disability, by their legally appointed guardians; but the person in whose behalf the complaint is made shall be named as plaintiff.

Fourth. Corporations, by any officer duly authorized by a vote of the corporation or its governing board.

SECTION 11. Section 28 of Chapter 185, as most recently amended by Section 3 of Chapter 423 of the Acts of 1971, is hereby amended by striking the section and inserting in place thereof the following: —

Section 28. The complaint shall be in writing, signed and sworn to by each plaintiff or by a person duly authorized in his behalf. It shall contain, a description of the land. It shall also state the name in full and the address of the plaintiff, and the names and addresses of the adjoining owners and

10 occupants, if known; and if not known, it shall state what
11 search has been made to find them.

1 SECTION 12. Section 29 of Chapter 185, as most recently
2 amended by Section 24 of Chapter 128 of the revised laws of
3 1902 is hereby amended by striking the section and inserting
4 in place thereof the following: —

5 SECTION 29. If the complaint describes the land as bounded
6 on a public or private way, it shall state whether or not the
7 plaintiff claims any and what land within the limits of the
8 way and whether the plaintiff desires to have the line of the
9 way determined.

1 SECTION 13. Section 30 of Chapter 185, as most recently
2 amended by Section 26 of Chapter 128 of the revised laws of
3 1902 is hereby amended by striking the section and inserting
4 in place thereof the following: —

5 SECTION 30. If a complaint is made subject to an existing
6 recorded mortgage, the holder of which has consented thereto,
7 or subject to a recorded lease for a term exceeding seven
8 years, or if the registration is to be made subject to such a
9 mortgage or lease executed after the time of the complaint
10 and before the date of the transcription of the judgment, the
11 plaintiff, before a judgment of registration is entered, shall,
12 if required by the court, file a certified copy of such mort-
13 gage or lease, and shall cause the original, or, in the discre-
14 tion of the court, a certified copy thereof, to be presented for
15 registration; and no registration fee shall be charged for regis-
16 tering such original mortgage or lease or such certified copy.

1 SECTION 15. Section 32 of Chapter 185, as most recently
2 amended by Section 22 of Chapter 128 of the revised laws of
3 1902 is hereby amended by striking in the first sentence the
4 word "petition" and inserting in place thereof the word: com-
5 plaint.

1 SECTION 16. Section 33 of Chapter 185, as most recently
2 amended by Sections 25 and 35 of Chapter 128 of the revised
3 laws of 1902 is hereby amended by striking this section and
4 inserting in place thereof the following: —

5 SECTION 33. The plaintiff shall file with the complaint a plan
6 of the land, and all original muniments of title within his con-
7 trol. Such original muniments as affect land not included in
8 the complaint may be withdrawn upon filing certified copies
9 thereof. If a complaint is dismissed or discontinued, the plain-
10 tiff may, with the consent of the court, withdraw such origi-
11 nal muniments to title. The court may, in any case before
12 judgment, require a further survey to be made for the purposes
13 of determining boundaries and may order durable bounds to
14 to be set, and referred to in the complaint, by amendment. The
15 expense of survey and bounds shall be taxed in the costs of
16 the case and may be apportioned among the parties as justice
17 may require. If no persons appear to oppose the complaint,
18 such expense shall be borne by the plaintiff.

1 SECTION 17. Section 34 of Chapter 185, as most recently
2 amended by Section 27 of Chapter 128 of the revised laws of
3 1902 is hereby amended by striking in the first sentence the
4 word "petition" and inserting in place thereof the word: com-
5 plaint.

1 SECTION 18. Section 35 of Chapter 185 as most recently
2 amended by Section 21 of Chapter 128 of the revised laws of
3 1902 is hereby amended by striking this section and inserting
4 in place thereof the following: —

5 *Section 35.* If the plaintiff is not a resident of the common-
6 wealth, he shall file with his complaint a paper appointing an
7 agent residing in the commonwealth, giving his name in full
8 and post office address, and shall therein agree that the service
9 of any legal process in proceedings under or growing out of
10 the complaint shall be of the same legal effect if made on
11 said agent as if made on the plaintiff within the common-
12 wealth. If the agent dies, or removes from the commonwealth,
13 the plaintiff shall forthwith make another appointment; and
14 if he fails to do so, the court may dismiss the complaint.

1 SECTION 19. Section 36 of Chapter 185, as most recently
2 amended by Section 28 of Chapter 128 of the revised laws of
3 1902 is hereby amended by striking this section and inserting
4 in place thereof the following: —

5 *Section 36.* After the filing of a complaint and before regis-
6 tration, the land therein described may be dealt with, and in-
7 struments relating thereto shall be recorded in the same man-
8 ner, as if no such complaint had been filed; but all instru-
9 ments left for record which relate to such land shall be indexed
10 in the usual manner in the registry indexes and in the index of
11 complaint. As soon as a complaint is disposed of, the recorder
12 shall make a memorandum stating the disposition of the case,
13 and shall send the same to the register of deeds for the
14 proper district or districts, who shall record and index it with
15 the records of deeds and in the index of complaint. If judgment
16 of registration of title is entered the land included in the
17 judgment shall, when the judgment is transcribed as provided
18 in Section forty-eight, becomes registered land and thereafter
19 no deeds or other instruments which relate solely to such land
20 shall be recorded with the records of deeds, but shall be
21 registered in the registration book and filed and indexed with
22 the records and documents relating to registered land.

1 SECTION 20. Section 37 of Chapter 185, as most recently
2 amended by Section 1 of Chapter 151 of the Acts of 1977 is
3 hereby amended by striking the present section and inserting
4 in place thereof the following: —

5 *Section 37.* Immediately after the filing of a complaint, the
6 court shall enter an order referring it to one of the examiners
7 of title, who shall search the records and investigate all facts
8 stated in the complaint, or otherwise brought to his notice,
9 and shall file in the case a report thereon, concluding with a
10 certificate of his opinion upon the title. The recorder shall

11 give notice to the plaintiff of the filing of such report.

1 SECTION 21. Section 38 of Chapter 185, as most recently
2 amended by Section 2 of Chapter 151 of the Acts of 1977 is
3 hereby amended by striking the present section and inserting
4 in place thereof the following: —

5 Section 38. Unless the plaintiff withdraws his complaint
6 within fourteen days of the notice of the filing of the exam-
7 iner's report from the recorder, the recorder shall cause notice
8 of the filing of the complaint to be published in the newspaper
9 published in the district where any part of the land lies. The
10 notice shall be issued by order of the court, attested by the
11 recorder, and shall be in form substantially as follows: —

12 COMMONWEALTH OF MASSACHUSETTS

13 Land Court

14 To (here insert the names of all persons known to have an
15 adverse interest, and the adjoining owners and occupants so
16 far as known, and to all whom it may concern: —

17 Whereas a petition has been presented to said court by
18 (name or names and address) to register and confirm his (or
19 their) title in the following described land (insert descrip-
20 tion).

21 If you desire to make any objection or defense to said peti-
22 tion you or your attorney must file a written appearance and
23 an answer under oath setting forth clearly and specifically
24 your objections or defense to each part of said petition, in the
25 office of the recorder of said court in Boston, (designation of
26 location) or in the office of the assistant recorder of said court
27 at the registry of deeds at in the county of
28 where a copy of the plan filed with said peti-
29 tion is deposited, on or before the day of
30 next. Unless an appearance is so filed by or for you, your de-
31 fault will be recorded, the said petition will be taken as con-
32 fessed and you will be forever barred from contesting said peti-
33 tion or any decree entered thereon.

34 Witness,, Esquire, judge of said court, this
35 day of in the year of nineteen hundred
36 and

37 Recorder

1 SECTION 22. Section 39 of Chapter 185, as most recently
2 amended by Section of Chapter of the revised laws of
3 1902 is hereby amended by striking this section and inserting
4 in place thereof the following: —

5 Section 39. The return day of said notice shall be not less
6 than twenty nor more than sixty days after the date of issue.
7 The court shall also, within seven days after publication of
8 said notice in a newspaper, cause a copy thereof to be sent by
9 the recorder by mailing a registered letter to every person
10 named therein whose address is known. The court shall also
11 cause a duly attested copy of the notice to be posted in a con-
12 spicuous place on each parcel of land included in the com-
13 plaint, by a sheriff or deputy sheriff, fourteen days at least
14 before the return day thereof and his return shall be conclu-

15 sive proof of such service. If the plaintiff requests to have the
16 line of a public way determined, the court shall order notice
17 to be given by the recorder, by mailing a registered letter to
18 the mayor of the city or to one of the selectmen of the town
19 or towns where the land lies, or, if the way is a highway, to
20 one of the county commissioners of the county or counties
21 where the land lies. If the land borders on a river, navigable
22 stream or shore, or on an arm of the sea where a river or
23 harbor line has been established, or on a great pond, or if it
24 otherwise appears from the petition or the proceedings that
25 the commonwealth may have a claim adverse to that of the
26 plaintiff, notice shall be given in the same manner to the at-
27 torney general. The court may also cause other or further
28 notice of the complaint to be given. The court shall, so far
29 as it considers it possible, require proof of actual notice to
30 all adjoining owners and to all persons who appear to have
31 any interest in or claim to the land included in the complaint.
32 Notice to such persons by mail shall be registered by letter.
33 The certificate of the recorder that he has served the notice
34 as directed by the court, by publishing or mailing, shall be
35 filed in the case before the return day, and shall be conclusive
36 proof of such service.

1 SECTION 23. Section 41 of Chapter 185, as most recently
2 amended by Section 33 of Chapter 128 of the revised laws of
3 1902 is hereby amended by striking in the second sentence the
4 word "petition" and inserting in place thereof the word: com-
5 plaint.

1 SECTION 24. Section 42 of Chapter 185, as most recently
2 amended by Section 34 of Chapter 12 of the revised laws of
3 1902 is hereby amended by striking the present action and in-
4 serting in place thereof the following: —

5 *Section 42.* If no person appears and answers within the
6 time allowed, the court may at once upon motion of the plain-
7 tiff, no reason to the contrary appearing, order a general de-
8 fault to be recorded and the complaint to be taken for con-
9 fessed. By the description in the notice, "to all whom it may
10 concern," all the world are made parties defendant and shall
11 be concluded by the default and order. After such default
12 and order, the court may enter a judgment confirming the
13 title of the plaintiff and ordering registration thereof. The
14 court, shall not be bound by the report of the examiner of
15 title, but may require other or further proof.

1 SECTION 25. Section 44 of Chapter 185, as most recently
2 amended by Section 1 of Chapter of the Acts of 1902 is
3 hereby amended by striking the present section and inserting
4 in place thereof the following: —

5 *Section 44.* If the court finds that the plaintiff has not
6 title proper for registration, a judgment shall be entered dis-
7 missing the complaint, and such judgment may be ordered to
8 be without prejudice, in whole or in part, but unless so or-
9 dered it shall bind the parties, their privies, and the land in

10 respect of any issue of fact which has been tried and deter-
11 mined. The plaintiff may withdraw his complaint at any time
12 before final judgment, upon terms fixed by the court. The
13 court may require a plaintiff who moves to withdraw his com-
14 plaint or to substitute some other person as plaintiff, to stipu-
15 late that he shall be bound by the result of any issue of fact
16 which has been tried and determined, and such stipulation
17 shall bind the parties, their privies and the land itself.

1 SECTION 26. Section 45 of Chapter 185, as most recently
2 amended by Section 3 of Chapter 374 of the Acts of 1923 is
3 hereby amended by striking the present section and inserting
4 in place thereof the following: —

5 SECTION 45. If the court, after hearing, finds that the plain-
6 tiff has title proper for registration, a judgment of confirma-
7 tion and registration shall be entered, which shall bind the
8 land and quiet the title thereto, subject only to the exceptions
9 stated in the following section. It shall be conclusive upon
10 and against all persons, including the commonwealth, whether
11 mentioned by name in the complaint, notice or citation, or
12 included in the general description "to all whom it may con-
13 cern." Such judgment shall not be opened by reason of the
14 absence, infancy or other disability of any person affected
15 thereby, nor by any proceeding at law or in equity for re-
16 versing judgments or decrees; subject, however, to the right
17 of any person deprived of land, or of any estate or interest
18 therein, by a judgment of registration obtained by fraud to
19 file a complaint for review within one year after the entry
20 of the judgment, provided no innocent purchaser for value
21 has acquired an interest. If there is any such purchaser, the
22 judgment of registration shall not be opened but shall remain
23 in full force and effect forever, subject only to the right of
24 appeal as provided by law from time to time. But any person
25 aggrieved by such judgment in any case may pursue his rem-
26 edy in tort against the plaintiff or against any other person
27 for fraud in procuring the judgment.

1 SECTION 27. The first paragraph of Section 46 of Chapter
2 185, as most recently amended by Section 38 of Chapter 128
3 of the revised laws of 1902 is hereby amended by striking in
4 the first sentence the word "petitioner" and inserting in place
5 thereof the word: "plaintiff."

1 SECTION 28. Said sentence of said paragraph of said Chap-
2 ter is further amended by striking the word "decree" and in-
3 serting in place thereof the word: judgment.

1 SECTION 29. Section 47 of Chapter 185, as most recently
2 amended by Section 4 of Chapter 423 of the Acts of 1971 is
3 hereby amended by striking in the first and fourth sentences
4 the word "decree" and inserting in place thereof the word:
5 judgment.

1 SECTION 30. The first paragraph of Section 48 of Chapter

185, as most recently amended by Chapter 48 of the Acts of 1949 is hereby amended by striking the paragraph and inserting in place thereof the following: —

Section 48. Immediately upon the entry of the judgment of registration, the recorder shall send a certified copy thereof, under the seal of the court, to the register of deeds for the district or districts where the land lies, and the register, as assistant recorder, shall transcribe the judgment in a book to be called the registration book, which a leaf or leaves in consecutive order shall be devoted exclusively to each title, and note therein the day, hour and minute when said judgment is transcribed. The entry made by the assistant recorder in this book in each case shall be the original certificate of title, shall be signed by him and sealed with the seal of the court. All certificates of title shall be numbered consecutively, beginning with number one. The assistant recorder shall in each case make an exact duplicate of the original certificate, including the seal, but putting on it the words "Owner's duplicate certificate", and deliver it to the owner or to his duly authorized attorney. In case of a variance between the owner's duplicate certificate and the original certificate, the original shall prevail. The certified copy of the decree of registration shall be filed and numbered by the assistant recorder, with a reference noted on it to the place of record of the original certificate of title. If, however, a complaint includes land lying in more than one district, the court shall cause the part lying in each district to be described separately by metes and bounds in the judgment or judgments of registration, the recorder shall send to the assistant recorder for each registry district a copy of the decree containing a description of the land within that district, and the assistant recorder shall register the same and issue an owner's duplicate therefor; and thereafter, for all matters pertaining to registration, the portion in each district shall be treated as a separate parcel of land. Said owner's duplicate certificate, for all the purposes of this chapter, may be produced by photographic process from the original certificate of title, either in whole or in part, and the photographic copy of an assistant recorder's signature on a duplicate certificate so produced shall have the same validity as his written signature.

SECTION 31. Section 49 of Chapter 185, as most recently amended by Section 41 of Chapter 128 of the revised laws of 1902 is hereby amended by striking the word "decree" as appears throughout this section and inserting in place thereof the word: judgment.

SECTION 32. The first sentence of Section 52 of Chapter 185, as most recently amended by Sections 1 and 2 of Chapter 445 of the Acts of 1978 is hereby amended by striking the word "decree" and inserting in place thereof the word: judgment.

SECTION 33. Said first sentence of said Section 52 of said

2 Chapter is hereby further amended by striking the word "peti-
3 tioner" and inserting in place thereof the word: plaintiff.

1 SECTION 33A. Said Section 52 is hereby amended by strik-
2 ing in its entirety the second sentence thereof.

1 SECTION 34. The first sentence of Section 56 of Chapter
2 185 as most recently amended by Section 48 of Chapter 128
3 of the revised laws of 1902 is hereby amended by striking said
4 sentence and inserting in place thereof the following: —

5 *Sentence 56.* The recorder, under the direction of the court,
6 shall make and keep indexes of all complaints, and of all judg-
7 ments of registration, and shall also index and classify all
8 papers and instruments filed in his office relating to com-
9 plaints to the registered titles.

1 SECTION 35. Section 56A of Chapter 185, as appearing in
2 Section 3 of Chapter 457 of the Acts of 1931 is hereby amend-
3 ed by striking said section and inserting in place thereof the
4 following: —

5 *Section 56A.* Complaints for the confirmation of title with-
6 out registration and all proceedings thereunder shall be gov-
7 erned by the provisions of this chapter applicable to com-
8 plaints and proceedings for the confirmation and registration
9 of title except as otherwise provided in this chapter. Upon
10 the recording in the registry of deeds for the district where
11 the land, or any portion thereof, lies, a copy of the decree
12 issued pursuant to such complaint for confirmation of title
13 without registration, the owner of such land, as determined
14 by such decree, shall hold the title thereto free from all en-
15 cumbrances except those set forth or referred to in said judg-
16 ment and those specified in section forty-six. Nothing con-
17 tained in this chapter shall be so construed as to prevent the
18 registration of title to land or easements or rights under the
19 provisions thereof on proceedings commenced either prior or
20 subsequent to a judgment confirming title without registra-
21 tion. Section ninety-nine shall not apply to proceedings for
22 confirmation of title without registration.

1 SECTION 36. The fourth sentence of Section 62 of Chapter
2 185 as most recently amended by Section 54 of Chapter 128
3 of the revised laws of 1902 is hereby amended by striking the
4 word "petition" and inserting in place thereof the word: com-
5 plaint.

1 SECTION 37. The first two paragraphs of Section 70, as
2 most recently amended by Section 1 of Chapter 296 of the
3 Acts of 1905 is hereby amended by striking said two para-
4 graphs and inserting in place thereof the following: —

5 *Section 70.* Mortgages of registered land may be foreclosed
6 like mortgages of unregistered land; but in case of foreclosure
7 by entry and possession, the certificate of entry required by
8 Section two of Chapter two hundred and forty-four shall be
9 filed and registered by an assistant recorder within thirty

10 days after the entry, in lieu of recording. After possession
11 has been obtained by the mortgagee or his assigns, by entry
12 or by action and has continued for the time required by law
13 to complete the foreclosure, he or his assigns may request
14 that the land court order the entry of a new certificate, and
15 the land court, after notice to all parties in interest, shall have
16 jurisdiction to hear the case, and may order the entry of a
17 new certificate on such terms as equity and justice may re-
18 quire.

19 In case of foreclosure by action as provided in Chapter two
20 hundred and forty-four, and by exercising the power of sale
21 in the mortgage under the direction of the court as provided
22 therein, a certificate copy of the final judgment confirming
23 the sale may, after the time for appeal therefrom has ex-
24 pired, be filed with the assistant recorder, and the purchaser
25 shall thereupon be entitled to the entry of a new certificate.

1 SECTION 38. The first sentence of Section 76 of Chapter
2 185, as most recently amended by Section 68 of Chapter 128
3 of the revised laws of 1902 is hereby amended by striking
4 cancellation when such request is made, the recorder or as-
5 sistant recorder shall not enter a new certificate, but the
6 person claiming to be entitled thereto may apply to motion
7 to the court. The court, after a hearing, may order the reg-
8 istered owner or any person withholding the duplicate cer-
9 tificate to surrender it, and direct the entry of a new cer-
10 tificate upon such surrender. If the person withholding the
11 duplicate certificate is not amendable to the process of the
12 court, or if for any reason the outstanding owner's duplicate
13 certificate cannot be delivered up, the court may by judgment
14 annul it and order a new certificate of title to be entered.
15 Such new certificate and all duplicates thereof shall contain a
16 memorandum of the annulment of the outstanding duplicate.

1 SECTION 45. Section 114 of Chapter 185, as most recently
2 amended by Section 107 of Chapter 128 of the revised laws
3 of 1902 is hereby amended by striking said section and in-
4 serting in place thereof the following: —

5 *Section 114.* No erasure, alteration or amendment shall be
6 made upon the registration book after the entry of a cer-
7 tificate of title or of a memorandum thereon and the attesta-
8 tion of the same by the recorder or an assistant recorder, ex-
9 cept by order of the court. A registered owner or other per-
10 son in interest may apply by motion to the court upon the
11 ground that registered interests of any description, whether
12 vested, contingent, expectant or inchoate, have terminated
13 and ceased; or that new interests not appearing upon the cer-
14 tificate have arisen or been created; or that any error or
15 omission was made in entering a certificate or any memoran-
16 dum thereon, or on any duplicate certificate; or that the
17 name of any person on the certificate has been changed; or
18 that the registered owner has married, or if registered as
19 married, that the marriage has been terminated; or that a
20 corporation which owned registered land and has been dis-

21 solved has now conveyed the same within three years after
22 its dissolution; or upon any other reasonable ground; and the
23 court may hear and determine the motion after notice to all
24 parties in interest, and may order the entry of a new cer-
25 tificate, the entry or cancellation of a memorandum upon a
26 certificate, or grant any other relief upon such terms, requir-
27 ing security if necessary, as it may consider proper; but this
28 section shall not authorize the court to open the original judg-
29 ment of registration, and nothing shall be done or ordered
30 withholding the duplicate certificate to surrender it, and di-
31 rect the entry of a new certificate upon such surrender. If
32 the person withholding the duplicate certificate is not amen-
33 able to the process of the court, or if for any reason the out-
34 standing owner's duplicate certificate cannot be delivered up,
35 the court may by judgment annul it and order a new certi-
36 cate of title to be entered. Such new certificate and all dupli-
37 cates thereof shall contain a memorandum of the annulment
38 of the outstanding duplicate.

Senate No. 695 extends the Massachusetts Rules of Civil Procedure to the Land Court Department of the Trial Court. These rules became applicable to the Land Court on January 1, 1980 by order of the Supreme Judicial Court. In order for the rules to be extended, however, the General Court and the Governor must approve the change.

Extension of these rules to the Land Court Department is consistent with the goals of unification. Wherever possible procedural rules should be made uniform throughout the Trial Court. The Council supports such an extension, but would suggest one minor modification in the bill.

We suggest that section 33A of Senate No. 695 be deleted before the bill is enacted. At the present time it is unclear whether section 52 of G.L. Chapter 185 requires that a public entity, upon acquiring registered land, withdraw the land from the registered land system. Section 33A amends section 52 in such a way as to prohibit public entites from withdrawing registered land from the system.

The Council believes that public entities should be given the option to either remain in the system or withdraw from it. Although clarification of section 52 of G.L. Chapter 185 is desirable, the amendment proposed by section 33A of Senate No. 695 is not in the public interest.¹

¹ See Discussion of Senate No. 1752.

V. INTERESTS IN LAND OWNED BY PUBLIC ENTITIES

A. WITHDRAWAL OF PUBLIC LAND FROM THE LAND REGISTRATION ACT

B. REMOVING POSSIBILITIES OF REVERTER AND RIGHTS OF ENTRY OWNED BY THE COMMONWEALTH

A. WITHDRAWAL OF PUBLIC LAND FROM THE LAND REGISTRATION ACT

SENATE . . . 1981 . . . No. 1752

AN ACT TO LIMIT THE WITHDRAWAL OF LAND FROM REGISTRATION.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 *Section 1.* Section 52 of Chapter 185 as amended by Chap-
- 2 ter 445 of the Acts of 1978 is hereby amended by striking the
- 3 word "shall" wherever it appears and substituting the word
- 4 "may" therefor.

Section 52 of G.L. Chapter 185 provides that land, once registered, shall be and forever remain registered land. This section was amended by section 1 of Chapter 445 of the Acts of 1978, which added the following provision:

If all of a parcel of land which is registered under this chapter is acquired by the commonwealth or any agency, department, board, commission or authority of the Commonwealth or authority of the Commonwealth or any political subdivision thereof or any authority of any such political subdivision, such

acquisition thereof *shall* be a sufficient ground for withdrawal of the registered land from the provisions of this chapter and the land *shall* be so withdrawn upon the filing of a petition with the court by the public entity which has acquired the registered land and the approval thereof by the court. (Emphasis supplied)

The intent of this amendment was to permit the withdrawal of registered land by public entities. It appears, however, that many public officials believe that this provision requires the “deregistration” of land.

By striking the word *shall* and substituting the word *may* in section 52, Senate No. 1752 makes it clear that public entities are given the option to either remain in or withdraw from the registered land system. This bill is consistent with the original intent of the 1978 amendment.

We believe that Senate No. 1752 should be enacted. Participation by the Commonwealth and its subdivisions in the registered land system enables the public to readily determine the nature and extent of a public entity’s rights in land.

B. REMOVING POSSIBILITIES OF REVERTER AND RIGHTS OF ENTRY OWNED BY THE COMMONWEALTH

SENATE . . . 1981 . . . No. 1754

AN ACT TO PROMOTE ECONOMIC USE OF LAND BY REMOVING ANCIENT IMPEDIMENTS TO MARKETABILITY

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 *Section 1.* Section 31A of Chapter 260 of the General Laws
2 is amended by striking from the first sentence of the third
3 paragraph the words: other than the Commonwealth.

1 *Section 2.* Section 2 and Section 4 of Chapter 527 of the
2 Acts of 1974, having been repealed by Chapter 356 of the Acts
3 of 1975, the remaining sections 1, 4, 5 and 6 of said Chapter
4 527 are hereby repealed.

- 1 *Section 3.* This act shall be retrospective as well as pro-
- 2 spective in its application, applying to all grants by the Com-
- 3 monwealth whether created before or after its effective date.

The common law recognizes that an owner of land has the right to alienate his property in fee subject to specified conditions. Depending upon the language used, the interest conveyed may be a fee simple determinable or a fee simple subject to a condition subsequent. If the estate conveyed is a fee simple determinable, then the property will automatically revert to the grantor, his heirs, devisees or assigns upon violation of the condition. Violation of a condition subsequent gives the grantor a right of entry. In this situation, the grantor, his heirs, or devisees, must either enter upon the land or bring an action to recover the land in order to terminate the grantee's estate.

These reversionary interests create severe impediments to the marketability of title. According to the common law, both these interests are descendable, but are not subject to the rule against perpetuities. As a result, conveyancers must trace title back to the original grant from the sovereign in order to insure that no outstanding interest exists. Such an examination is very costly.

There have been several legislative attempts to remove impediments to the marketability of title. According to section 3 of G.L Chapter 184A, a fee simple determinable or a fee simple subject to a condition subsequent becomes a fee simple absolute if the specified contingency does not occur within thirty years after its creation. This section, however, does not limit reversionary interests created prior to January 2, 1955.

Reversionary interests created before 1955 are governed by G.L. Chapter 260, §31A. This section provides that no proceeding can be brought based on these interests, unless they were recorded prior to 1964.

While it was clear from the outset that §31A applied to private reversionary interests, it was less clear whether the recording requirements of this section applied to land conveyed by the Commonwealth. Section 31A, as originally enacted, is silent on this issue, stating that it shall apply to all such reversions whether or not the owner is a "government or governmental subdivision." See 1956 Mass. Acts. Ch. 258, §2.

It may be argued, however, that §31A was intended to apply to lands conveyed by the Commonwealth. Of crucial impor-

tance is the fact that §31A, as originally enacted, did not specifically exempt the Commonwealth from its provisions. It should be noted that when the General Court enacted similar legislation, G.L. Chapter 184A, which modified the rule against perpetuities, the Commonwealth was specifically excluded. *See* 1954 Mass. Acts Ch. 641, §1. In addition, in commenting on the bill which later became §31A, the Council did not distinguish between reversionary interests held by the Commonwealth and interests held by private citizens. *See* Thirty-First Report of the Judicial Council (1955) Pub. Doc. No. 144, p. 22.

In 1968, the General Court moved to protect the state's reversionary interests by explicitly excluding the Commonwealth from the provisions of §31A. *See* 1968 Mass. Acts Ch. 496. In 1974, the General Court declared that the 1968 amendment was to be applied retroactively and that section 31A was never intended to include the Commonwealth. *See* 1974 Mass. Acts Ch. 527, §§1, 4.

The 1968 and 1974 amendments to section 31A create uncertainty surrounding the Commonwealth's reversionary interests. If the provisions of section 31A, as originally enacted, were applicable to the Commonwealth, then all reversionary interests not recorded prior to 1964 were extinguished. The later amendments, however, retrospectively revitalized these interests beginning in 1968. Accordingly, individuals who purchased land from the Commonwealth between 1964 and 1968, relying on section 31A, now have a cloud on their title.

Senate No. 1754 amends section 31A by striking from the first sentence of the third paragraph the words: *other than the Commonwealth*. Section 3 of Senate 1754 provides that the bill shall be retrospective as well as prospective. The impact of the bill will be to extinguish all rights of entry and possibilities of reverter held by the Commonwealth created prior to 1955 but not recorded before 1964. The bill will also eliminate the confusion surrounding conveyances made by the Commonwealth between 1964 and 1968. The Council believes that Senate No. 1754 should be enacted.

VI. CONDOMINIUM LEGISLATION

A. PROCEDURES FOR CONDOMINIUM REGISTRATION

B. PROCEDURE FOR AMENDING CONDOMINIUM MASTER DEEDS

A. PROCEDURES FOR CONDOMINIUM REGISTRATION

SENATE . . . 1981 . . . No. 692

AN ACT TO FACILITATE THE REGISTRATION OF CONDOMINIUMS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 *Condominium Registration.* Except as otherwise provid-
2 ed in this section, petitions for condominium registration
3 and all proceedings thereunder, shall be governed by the
4 provisions of Chapter 185 of the General Laws applicable
5 to petitions and proceedings for the confirmation and regis-
6 tration of title to land. A petition for condominium registra-
7 tion may be filed by the owner of real estate or by an organ-
8 ization of unit owners established pursuant to Chapter 183A
9 of the General Laws on behalf of all unit owners, if author-
10 ized in the same manner as the by-laws of the organization
11 may be amended, whether or not the master deed or by-laws
12 specifically provide such authority. The petitioner shall in-
13 clude with his petition a master deed description based upon a
14 plan of the land which is acceptable to the court.

15 The location of building or buildings comprising the condo-
16 minium or proposed condominium shall be shown on the plan
17 as accepted by the court. If the petitioner indicates that addi-
18 tional units are to be built, and the undivided interest of the
19 unit owners will thereupon change, the proposed phased areas
20 shall be shown and clearly labelled on the plan. The petitioner
21 shall submit floor plans meeting the requirements of Section

8(f) of Chapter 183A of the General Laws. The petitioner shall also include with the petition a land court examiner's report of title on such form as the court may prescribe concluding with a certificate of his opinion upon the title. Following the filing of the petition, the recorder shall order that notice be given to any person or persons who appear on the basis of the petition to have an interest in or a claim to the land included in the petition, abutters to the land as set forth in the petition, and such other notice as the recorder may determine necessary. If, after notice and opportunity for hearing, or after hearing, the court finds that the petitioner has title proper for condominium registration, a decree of condominium registration shall be entered; provided, however, that the court shall not be bound by the report of the examiner of title or other evidence of title filed with the petition, but may require other or further proof of title to be filed, including any evidence of title subsequent to the filing of the master deed, prior to entering the decree of condominium registration. No decree of condominium registration shall become effective until the condominium has been formed pursuant to Chapter 183A of the General Laws. The court may, by rule, procedure or direction, provide for a separate memorandum of unit ownership for each unit in the condominium.

Upon recording in the southern middlesex registry of deeds of notice of disposition issued pursuant to a petition of condominium registration, the owner, as determined by the decree of condominium registration, shall hold the title subject to any preexisting interests as of the effective date of the decree unless the decree states to the contrary, but free from all other encumbrances except those set forth or referred to in the decree and those specified in Section 46; provided, however, that no title to land or estate or right therein, in derogation of the title to land confirmed and registered with boundary determination pursuant to the provisions of Chapter 185 of the General Laws, whether prior or subsequent thereto, shall be cut off or extinguished by a decree of condominium registration issued pursuant to the provisions of this section.

The registration of condominiums is governed by section 16 of G.L. Chapter 183A. As originally enacted, this section provided for the withdrawal of land from the registration system once a condominium was created. *See* 1963 Mass. Acts Ch. 493, §1. Today, section 16 provides that a condominium may be registered by filing a master deed under the provisions of Chapter 185.

Registration of condominiums presents some unique problems which are not specifically dealt with in either Chapter 183A or Chapter 185. Senate No. 692 clarifies this area by establishing specific procedures for the registration of condominiums.

Section 33 of G.L. Chapter 185 requires that a survey plan be filed with a petition for registration. In most instances, a complete land survey and detailed set of plans are drafted for condominium projects. While some of the plans are inadequate for the purposes of registration, many surveys meet Land Court standards. Accordingly, where the original plans are adequate, they can be used for registration. In these instances, the filing of new registration plans merely serves to increase the costs of registration. Senate No. 692 allows a petitioner to use his original plans for registration purposes, provided they are acceptable to the Land Court.

A second issue involves the right to file a petition for registration. Section 16 of Chapter 185 states that an owner of land has the authority to file a petition. Senate No. 692 provides that a registration petition may be filed by either the owner of land or by an organization of unit owners established pursuant to G.L. Chapter 183A. Specific authorization in the master deed is not required. Instead, an organization's authority to petition for registration may be authorized in the same manner as an amendment to the by laws.

Senate No. 692 requires that several items be included in the registration petition. A master deed description based upon a plan of the land must be filed containing the location of all condominium buildings. Any additional buildings which affect the undivided interests of unit owners are required to be clearly labeled. Floor plans meeting the requirements of G.L. Chapter 183A, §8(f) must be submitted.¹ The bill also requires the filing of a Land Court examiner's report and a certificate of opinion on the title.

After the petition is filed, notice is given to all interested parties. A decree of registration may be issued by the court either after notice and an opportunity for hearing or after completion of a hearing. In reaching its decision, the court is not bound by the evidence submitted in the petition and may order the filing of additional evidence. No decree of registration may be entered until the condominium has been formed pursuant to

¹ G.L. Ch. 183A, §8(f) reads: A set of floor plans of the building or buildings showing the layout, location, unit numbers and dimensions of the units, stating the name of the building or that it has not a name, and bearing the verified statement of a registered architect, registered professional engineer, or registered land surveyor, certifying that the plans fully and accurately depict the layout, location, unit numbers and dimensions of the unit built.

G.L. Chapter 183. A separate memorandum of unit ownership for each unit in the condominium may be required by the court.

Senate No. 692 also outlines the rights of condominium owners. A notice of disposition issued pursuant to the registration petition must be recorded in the registry of deeds. Once recorded, the owner holds title subject to interests existing prior to the effective date of the registration decree. An owner is free from all encumbrances with the exception of those mentioned in the decree and those arising under Chapter 183, §46. In addition, a decree of registration will not impair title to land registered pursuant to G.L. Chapter 185 whether created prior or subsequent to the decree.

The Council believes that Senate No. 692 should be enacted. The bill clarifies the registration procedures for condominiums. Moreover, the bill takes into consideration the unique problems of registering condominiums, especially in the areas of ownership and the filing of plans. We would suggest, however, that the words "southern middlesex" in line 45 be deleted before the bill is enacted. These words refer to a model project conducted in the southern middlesex registry of deeds. Since the bill would apply to condominium registration throughout the Commonwealth, recording should take place in all registries of deeds.

B. PROCEDURE FOR AMENDING CONDOMINIUM MASTER DEEDS

SENATE . . . 1981 . . . No. 1753

AN ACT TO PROVIDE FOR AMENDING A MASTER DEED UNDER CHAPTER 183A.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 Section 5 of Chapter 183A of the General Laws is hereby
- 2 amended by striking out paragraph (b) thereof and inserting
- 3 in place thereof the following new paragraph (b): —

- 4 (b) The percentage of the undivided interest of each unit
5 owner in the common areas and facilities as expressed in the
6 master deed shall not be altered without the consent of all
7 unit owners, expressed in an amended master deed duly re-
8 corded; provided, however, that where economic necessity,
9 supervening impossibility, legal, physical or otherwise, mis-
10 take, fraud or any unforeseen irremediable event require in
11 justice or in equity the reformation of a master deed a unit
12 owner or owners may bring a civil action assented to by not
13 less than 75 percent of the unit owners sounding in equity in
14 land court department of the trial court. Upon the commence-
15 ment of such proceeding the land court department shall re-
16 quire notice by registered mail or otherwise, to all unit owners
17 who are not plaintiffs and have not assented to its filing and
18 such other parties in interest of record as it may require, and
19 shall after hearing grant such relief as is meet and just.

Each unit owner of a condominium possesses an undivided interest in the common areas. The percentage ownership of common areas owned by each unit is required to appear in a master deed. *See* G.L. Ch. 183A, §8(e). A change in ownership in common areas can only be accomplished by amending the master deed.

Presently, there are several obstacles to amending a master deed with respect to common areas. The percentage of the undivided interest of each unit owner in these areas cannot be altered without the consent of *all* unit owners. G.L. Ch. 183A, §5(b). As a result of this provision, many beneficial proposals can be vetoed by a small minority of unit owners. The problem is exacerbated by the fact that courts are powerless to grant relief in these cases.

Senate No. 1753 amends §5(b) by eliminating the need to obtain the consent of all unit owners in certain situations. The bill also gives unit owners the right to seek equitable relief where economic necessity, supervening impossibility, legal, physical or otherwise, mistake, fraud or any unforeseen irremediable event requires the reformation of a master deed. In order to seek relief, however, consent must be obtained from at least 75% of the unit owners. The Land Court is given jurisdiction to hear these disputes.

The Council believes that Senate No. 1753 should be enacted. As presently written, §5(b) vests too much power in the hands of a minority of unit owners. By requiring consent of at least 75% of the unit owners, the bill provides relief to the majority, while protecting the interests of the minority.

VII. JUDICIAL COMPENSATION COMMISSION

HOUSE . . . 1981 . . . No. 5776

AN ACT ESTABLISHING THE JUDICIAL COMPENSATION COMMISSION.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 There is hereby established a standing commission for the con-
2 tinuing evaluation of judicial compensation to be called the Judi-
3 cial Compensation Commission. Said commission shall be com-
4 posed of seven members who shall serve without compensation to
5 be appointed as follows:

6 The Chief Justice of the Supreme Judicial Court shall appoint
7 two members, one of whom shall be a justice of the trial court or an
8 appellate court and one of whom shall be an attorney in private
9 practice.

10 The Governor shall appoint two members, one of whom shall be
11 the chairman, and at least one of whom shall be a private citizen;

12 The President of the Senate shall appoint one member;

13 The Speaker of the House shall appoint one member; and

14 One member shall be appointed by the Attorney General of the
15 Commonwealth.

16 Vacancies shall be filled in the same manner as original appoint-
17 ments.

18 The commission shall investigate, evaluate and make recom-
19 mendations concerning compensation for justices of the trial court
20 and appellate courts of the Commonwealth of Massachusetts. In
21 carrying out this charge the commission shall review compensa-
22 tion rates in the federal court system, court systems in comparable
23 states, the private practice of law and private industry to make
24 recommendations which reflect compensation rates which will
25 attract and maintain a judiciary of the highest caliber.

26 The commission shall report not later than December first of
27 each year to each branch of government, and shall file with its
28 report legislation necessary to implement its recommendations. A
29 copy of its annual report shall be filed with the Clerks of the Senate
30 and House.

The salaries of judges and justices are currently fixed by statute.¹ As a result, legislation is required in order to change

¹ See G.L. Ch. 211, §22, Supreme Judicial Court; G.L. Ch. 211A, §3, Appeals Court; G.L. Ch. 211B, §4 Trial Court Department.

the present levels of compensation. Unfortunately, legislators often do not have sufficient time to systematically evaluate judicial salaries.

Unlike constitutional officers in the executive and legislative branches, there is no agency responsible for the systematic evaluation of judicial compensation.² Section 1.23(b) of the Standards Relating to Court Organization published by the American Bar Association states:

... A compensation review board should be established to review and make periodic recommendations concerning compensation of judges. It should consist of persons familiar with compensation levels in the executive branch of government, among the legal profession and executives in other professions.

Comments to section 1.23(b) stress the importance of independent and systematic review.

Review of judicial compensation by the legislature alone involves the risk of indifference, and frequently involves also the complications of relating increases in judicial salaries to increases in the legislators' own compensation. Review of judicial compensation by the judiciary itself is self-serving, and entails unseemly advocacy of personal interest. A more satisfactory method of performing the task is the creation of an independent agency having this specific responsibility.

House No. 5776 is consistent with the goals established by the American Bar Association. The bill creates a seven member commission which evaluates the compensation of justices in the Trial and Appellate Court Departments. The President of the Senate, Speaker of the House and the Attorney General each appoint one person to the commission. The Governor appoints two members to the commission, one of which would become the chairman. The bill also requires that one of the Governor's appointments come from the "private sector." The Chief Justice of the Supreme Judicial Court appoints two members to the commission; a justice from either the Trial or Appellate Court Department and an attorney from private practice. The commission is responsible for investigating judicial compensation and reporting its conclusions by the first of December of each year.

² See G.L. Ch. 6, §162 creating the Advisory Board on Legislative and Constitutional Officers Compensations.

Establishing a commission to evaluate judicial compensation benefits the Commonwealth. Adequate compensation is essential in order to attract and retain qualified judges. While many judges expect lower levels of compensation as compared with the private sector, there should be a reasonable relation between judicial salaries and salaries of similar professions. The information provided by the commission will help the legislature reach an informative opinion about judicial compensation.

VIII. THE UNIFIED BUDGET

(See Attached Tables)

Fiscal 1981 was the second year of a centralized budget for the judiciary and the total appropriation amounted to \$144.9 million. This represents a 6.4% increase over the budget for fiscal 1980. Appropriations for fiscal 1980, including supplemental funds appropriated under Chapter 354 of the Acts of 1980, amounted to \$136.2 million.

The judiciary requested \$209.1 million for fiscal 1981. Actual appropriations amounted to only 69.3% of this request. The 1981 budget, however, exceeded the governor's recommendation by over \$4 million. Statistical comparisons between the fiscal 1981 budget, the 1980 budget, the 1981 judicial request and 1981 executive recommendation can be found in Table No. 1.

The judiciary has requested \$230.8 million for fiscal 1982, an increase of 59.29% over 1981. The governor, however, has recommended a budget of \$158.2 million, an increase of 9.2%. Statistics comparing the fiscal 1982 judicial requests and executive recommendations with fiscal 1981 appropriations appear in Table No. 2.

It is clear that the governor and legislature do not intend to rubber stamp the budget requests of the judicial branch. In all but one category, counsel for indigent defendants, appropriations for fiscal 1981 were significantly less than judicial requests.

Budget statistics contained in this report do not necessarily indicate that increases or decreases in departmental or divisional budgets were unwarranted. Significant budget variations may be due to the fact that some divisions were previously underfunded. Caseload variations may also account for differences in appropriations. Consequently, it is difficult to conclude from the data presented, whether there has been an inequitable distribution of judicial appropriations. In order to reach such a conclusion, a budget index must be established. This index would be based on previous funding as compared with the court's work load. Once obtained, appropriations can be compared with this index to determine whether a particular division or department has deviated from the norm.

Unfortunately, a budget index is not yet available. State

funding of the judiciary is only in its second year. It is difficult to establish an accurate index based on appropriations over such a short period of time. In addition, Trial Court statistics do not give a clear indication of current or projected work loads.

The Council refrains from making any conclusions, with respect to possible inequities in the judicial budget. Our intention is merely to describe the fiscal condition of the judiciary.

A. LINE ITEM BUDGETING AND CENTRALIZED MANAGEMENT

While centralized budgeting removes many jurisdictional inequities, it subjects the judicial branch to greater fiscal control by the executive and legislative branches. The primary benefit of court reorganization is the centralization of management under the Office of the Chief Administrative Justice of the Trial Court. It is imperative that the Chief Administrative Justice and the Administrative Justice of each department be given the flexibility to manage the judiciary.

Present budgeting procedures hinder the management of the judiciary. Each division of every department receives a specific line item in the budget. The line item includes the amount appropriated for each division and the maximum number of permanent positions funded. As a result of line item budgeting, the legislature, not the judiciary, has the ultimate power to assign personnel.

While the judicial budget should not be immune from critical review by the legislature, budgeting procedures should be established which allow the judiciary to manage its own affairs. One alternative would be to have appropriations and permanent positions funded at the department, rather than the divisional level. This procedure would provide the Administrative Justice of each department with greater authority.

It is important to recognize that budgeting at the department level will not necessarily impede legislative review. The General Court would still be able to examine the appropriations for each division of every court department. The proposal merely alters the way in which the budget is itemized.

The Council believes that the present system of line item

budgeting at the divisional level is too restrictive and inconsistent with the goals of unification. We suggest that the legislature explore alternative methods of budgeting.

B. SUPREME JUDICIAL COURT

FY 1980	5,782,938
FY 1981	6,252,146
Requested for FY 1982	11,622,473
Recommended for FY 1982	7,193,575

Total appropriations for the Supreme Judicial Court increased in fiscal 1981 by 8% to \$6.2 million. The most significant increase occurred in the item for salaries and expenses (0320-0003). In fiscal 1980, the Supreme Judicial Court received \$1.5 million to fund not more than sixty-seven permanent positions. This appropriation increased to \$1.8 million in fiscal 1981, and the number of permanent positions rose to seventy-three.

The judiciary requested \$11.6 million for fiscal 1981. Actual appropriations amounted to 53.78% of this request. The executive recommended \$6.7 million for fiscal 1981, receiving 92% of this recommendation.

The judiciary is asking for \$11.6 million in fiscal 1982, an increase of 85.89% over fiscal 1981. The governor's recommendation of \$7.2 million represents a 30.25% increase over fiscal 1981.

C. APPEALS COURT

FY 1980	1,383,767
FY 1981	1,543,500
Requested for FY 1982	1,636,347
Recommended for FY 1982	1,580,962

Funding for the Appeals Court increased by 11.54% in fiscal 1981. The majority of this increase went towards the salaries and expenses line item (0322-002). This category increased 16.9%, from \$914,767 in fiscal 1980 to \$1.07 million in 1981. Salaries, expenses and travel allowances of the Chief Justice and nine associate justices (0322-001) increased by only .959%.

The appropriation was comparable to the judicial request and executive recommendations for fiscal 1981.

The judiciary has requested \$1.6 million for fiscal 1982, an increase of 6% over 1981. The executive recommendation would increase the Appeals Court's budget by 2.4% to \$1.58 million.

D. TRIAL COURT BUDGET

FY 1980	12,227,144
FY 1981	23,921,571
Requested for FY 1982	64,191,581
Recommended for FY 1982	46,888,814

Total administrative funding increased by \$12.5 million, from \$12.2 million in fiscal 1980 to \$23.9 million in fiscal 1981. This represents a 95.6% increase. Despite this dramatic increase, fiscal 1981 appropriations were \$18.4 million less than the judicial request, but exceeded the governor's recommendation by \$4.7 million.

Several administrative items which were in the 1980 budget were not included in the 1981 budget:

0330-2700	Printing of Forms and Stationery	\$1,289,527
0330-2800	Repairs of Equipment	219,314
0330-2900	Library Materials	368,515
0330-3000	Equipment Rental	1,089,486

The 1981 Trial Court budget, however, included funds for several programs not previously funded.

0330-1000	Jury Expenses	\$3,745,000
0330-2100	Counsel to Indigents	4,734,708
0330-4000	Education & Training Programs	60,000

These programs were a major factor in the overall increase in the Trial Court's administrative appropriations for fiscal 1981.

Projections for fiscal 1982 demonstrate a dramatic increase in appropriations for the Trial Court. The judiciary has asked for \$64.2 million, an increase of 168.3%. The governor has recommended \$46.9 million, an increase of 96%. (See Table No. 2)

Justices' salaries and expenses for fiscal 1982 (0330-0100) are now centralized in the Trial Court's budget. Appropriations

for court officers (0330-3200) are also included in the budget for the Trial Court. These expenses were previously included in the budgets for each department.

Elimination of these items from the Trial Court's budget would significantly reduce the projections for fiscal 1982. The executive recommendation would decrease by \$18.7 million, bringing the Trial Court's budget to \$28.1 million. This would represent 17.8% increase over fiscal 1981. The judicial request would decrease from \$64.2 million to \$45.3 million, an increase of 89.3% over fiscal 1981.

1. Item 0330-1000 - Trial Court - Juries

FY 1980	4,519,000
FY 1981	3,745,000
Requested for FY 1982	5,240,456
Recommended for FY 1982	4,716,410

Prior to fiscal 1981, jury expenses were considered part of the Superior Court's budget (0331-0400). The \$3.7 million appropriation, therefore, does not represent a net increase in spending on juries. In fiscal 1980, \$3.5 million was originally appropriated for jury expenses in the Superior Court. An additional \$1.19 million was provided by supplemental budgeting during the fiscal year, bringing the total to \$4.5 million. (See Table No. 1) Accordingly, actual appropriations for jury expenses declined in fiscal 1981 by 17%.

The judicial request for fiscal 1982 would increase this item by 39.9% over fiscal 1981. The executive recommendation calls for a 25.9% increase.

Court reorganization has increased the demand for juries, especially at the district court level. Additional appropriations will be needed to meet judicial requirements. Centralization of jury expenses provides greater management of jury expenses and is consistent with the goals of unification.

2. Item 0330-2200 - Trial Court - Rental of Court Facilities

FY 1980	5,154,784
FY 1981	11,805,561
Requested for FY 1982	24,731,055
Recommended for FY 1982	11,805,561

Allocations for the rental of court facilities increased by 105% in 1981. Appropriations for this category increased by \$6 million from \$5.7 million in 1980 to \$11.8 million in 1981. The increase should help alleviate the tension existing between the state and county government over this issue. The appropriation fell short of the judicial request by \$15.7 million and exceeded the governor's recommendation by \$7.2 million. The judicial request for fiscal 1982 would increase appropriations for this item to \$24.7 million, an increase of 109.5% over fiscal 1981. The governor, however, has recommended that funding for court rentals remain constant at \$11.8 million.

In our Fifty-Fifth Report, we noted that appropriations for the rental of court facilities were inadequate. Despite the 105% increase in fiscal 1981, appropriations for this item remain unrealistically low.

The more fundamental issue is whether the Commonwealth should purchase courthouse facilities. In 1978, a commission was established to report on the status of all buildings occupied by the judicial branch. Results of the investigation were published in June of 1980. The commission recommended that the Commonwealth purchase all facilities that are totally or substantially occupied (50% or above) by the judicial branch, with the exception of the Chelsea Division and with a qualification on the Third Bristol Division of the District Court.

The commission noted that an estimated \$18 million would be saved in maintenance and repair costs if court facilities were purchased by the state. An estimated \$9 million would be saved by the elimination of annual payments on building debt and \$66 million would be saved on necessary short term renovations.

Several counties have threatened to evict the judiciary because of insufficient rental payments. On one occasion, an injunction was required to prevent a county from denying access to the courthouse. Purchasing these facilities would eliminate conflicts with county governments.

Continued vacillation by the Commonwealth on this issue will result in further deterioration of court facilities. Construction projects have been postponed because of this uncertainty. The problem is exacerbated by the fact that only 12% of the structures examined by the commissioner's consultants were in adequate physical condition. Further delay jeopardizes the judiciary's ability to renovate these facilities.

If the Commonwealth continues to rent court facilities, then appropriations must be increased to reflect a fair market rent. In the long run, however, a purchase of these facilities would be a superior policy.

3. Item 0330-2100 - Trial Court - Counsel to Indigents

FY 1980	0
FY 1981	4,734,708
Requested for FY 1982	9,032,727
Recommended for FY 1982	7,089,117

Increased appropriations for this item demonstrates continued support for the use of private county bar advocate programs. These appropriations will further decrease the burdens imposed on the Massachusetts Defenders Committee.

Many attorneys representing indigent clients found it difficult to receive payment for their labors during fiscal 1980. Delays arose because of split funding between the state and the Trial Court. In addition, several courts failed to submit vouchers to the state by the end of the fiscal year. As a result, the legislature was unable to include these fees in the fiscal 1980 deficiency budget.

In order to avoid the problems incurred during fiscal 1980, a new indigent defense policy was established for fiscal 1981. Funding and management of the various indigent programs was centralized in the Office of the Chief Administrative Justice. This avoided the confusion which resulted because of the split funding procedure used during fiscal 1980.

Under the new procedures, all bills must be submitted by the attorney to the Clerk or Register in the court where the appointment was made. Attorneys must file their bills no later than seven days after the representation has terminated. The clerk or register must submit the bills to the Trial Court Administrative Office within fourteen days after receipt.

The Chief Administrative Justice also promulgated new standards for the appointment of counsel for indigents. According to the new policy, attorneys outside a county bar advocate program may only be hired by a court under special circumstances. If a judge wishes to appoint an attorney other than through established programs, he must file a written statement explaining the reasons for deviating from normal procedures.

Bar Advocate Programs now operate in all counties except Suffolk, Berkshire and Nantucket. Massachusetts defenders currently represent indigents in Berkshire County. In Suffolk County, Massachusetts Defenders represent clients in probable cause hearings. Rule 10 appointments are used in Nantucket County and in Suffolk County.

4. Item 0330-03004 - Trial Court - Administrative Staff

FY 1980	675,000
FY 1981	1,261,374
Request for FY 1982	1,677,217
Recommended for FY 1982	1,373,838

In fiscal 1981, appropriations for the administrative staff increased 86.9% over fiscal 1980. Funding for this item, however, was less than both the judicial request and executive recommendation for fiscal 1981. The judiciary has asked for a 32.9% increase in fiscal 1982. The executive recommendation would increase this item by 8.9%. These increases are consistent with the mandate of court consolidation.

Pursuant to G.L. Chapter 150E §3, a bargaining unit, comprising all non-managerial or non-confidential and clerical personnel was selected in 1980. Local 6, Office & Professional Employees Union, was selected in a run off election held on July 9, 1980.

It appears that Local 6 plans to take an active role in all judicial departments. Prior to the election, Local 6 proposed the following organizational structure:

1. Five business agents hired from within the clerical judicial system.
2. Five judicial employees elected at large to serve on the Executive Board of Local 6.
3. Five State Districts — One chairperson and one sergeant-at-arms for each district. Each chairperson will be a member of the Executive Board. (All elected) One business agent for each district. Approximately 25 clerical employees elected statewide to assist the business manager and staff in contract negotiations.
4. Shop stewards for each court.

If this structure is adopted, then every court division of the judiciary will have at least one union representative.

Potential issues for collective bargaining were outlined in a questionnaire distributed to all judicial employees. In surveying the needs of its new membership, Local 6 focused on the following issues: medical coverage; job classifications; flexible work days; vacancies; seniority; sick leave; grievance procedures; holidays; leaves of absence and working hours.

At the present time, it is impossible to assess the impact of unionization on the judiciary. Nevertheless, it seems clear that salaries will increase.

E. SUPERIOR COURT DEPARTMENT

FY 1980	19,395,882
FY 1981	24,444,665
Requested for FY 1982	30,301,256
Recommended	16,643,476

Actual Superior Court appropriations increased by 26% in fiscal 1981. Although jury expenses were budgeted through the Superior Court Department in fiscal 1980, they have been subtracted from the Superior Court for the purposes of this analysis. This procedure provides for a more accurate comparison of the department's budget. (See Table No. 1)

Including appropriations for jury expenses in the Superior Court's budget would increase appropriations to \$23.9 million for fiscal 1980. Fiscal 1981 appropriations would then represent an increase of only 2.2%.

The 26% increase in fiscal 1981 was due to increased appropriations for administration. Over \$4 million was appropriated for probation services (0331-0600), an item not funded in fiscal 1980. Salaries and expenses for the administrative staff increased from \$264,090 in fiscal 1980 to \$400,000 in fiscal 1981. Overall, the administrative budget of the Superior Court increased 116.8%. Funding for clerical assistance increased \$199,920 from \$840,000 in 1980 to \$1.04 million in 1981 representing a 23.8% increase. Appropriations for the medical malpractice tribunals remained the same at \$40,000.

While funding for administrative programs increased, allocations directed toward the county departments decreased by 2% in fiscal 1981. County department appropriations fell from \$16.6 million in fiscal 1980 to \$16.3 million in fiscal 1981.

The greatest decreases appear to be in the more populated counties. Funds for the Middlesex Division decreased by \$536,623, a 14.4% decline. The Suffolk Criminal Division's budget was cut by 25.5%. A 6% budget decrease was reported for Worcester. The budgets for the Hampshire, Bristol and Berkshire Divisions were also cut. In contrast, allocations for the Barnstable, Dukes, Essex, Franklin, Hampden, Nantucket, Norfolk, Plymouth and Suffolk Civil Divisions were increased in fiscal 1981. The largest increases were found in the Dukes (108%); Franklin (93.25%); and Nantucket (74.4%) Divisions. (See Table No. 1.1)

These decreases appear to be consistent with an overall reduction in staff from fiscal 1980. The maximum number of permanent positions dropped 28% from 945 positions in 1980 to 680 positions in 1981. The greatest reductions took place in those counties with the heaviest caseloads. For example, Suffolk Superior Criminal Court lost 58 permanent positions and suffered a budget decrease of 25.55%. Middlesex Superior Court lost 101 positions. (See Table No. 1.2)

While the Superior Court Department enjoyed a budget increase in fiscal 1981, there were significant budgeting shifts within the department. The appropriations tend to demonstrate an increased emphasis on the administration of the department. This is consistent with the goal of unified management.

The judiciary has requested \$30.3 million for the Superior Court in fiscal 1982, an increase of 24%. The executive recommendation would reduce the budget to \$16.6 million, a decrease of 31.9%.

It should be noted that justices' salaries and travel expenses are included in the Trial Court's budget for fiscal 1982. Also, court officers' salaries are no longer budgeted through the Superior Court. If the justices' salaries were included, appropriations would increase to \$19 million. Including travel expenses and court officers, salaries would bring projected appropriations close to the fiscal 1981 level.

F. DISTRICT COURT DEPARTMENT

FY 1980	\$43,268,951
FY 1981	48,599,331
Requested for FY 1982	65,288,066
Recommended for 1982	43,714,010

Total appropriations for the District Court Department increased in fiscal 1981 by 12.3%. Allocations for the administrative staff increased from \$258,466 in 1980 to \$289,000 in 1981, an increase of 9.88%. Aggregate calculations for each division show a 12.3% increase in fiscal 1981. (See Table 1.3)

These allocations were significantly less than the judicial request for fiscal 1981. Total appropriations, including divisional allocations, were \$15.8 million less than the judicial request, but exceeded the executive recommendation. (See Table 1)

Only two divisions suffered budget cuts in fiscal 1981. The Amesbury Division received \$34,096 less than the \$278,096 allocated in fiscal 1980, a decrease of 12.26%. Appropriations for the Chicopee Division were reduced by 9.5%. (See Table 1.4)

There were few personnel changes in fiscal 1981. Overall, 2,593 permanent positions were funded, an increase of six positions over fiscal 1980. The greatest increase took place in the Newton Division with the addition of eight positions. The greatest decrease occurred in the Roxbury Division with the elimination of nine positions. (See Table 1.4)

The judiciary has asked for \$65.3 million in fiscal 1982, an increase of 34%. The governor has recommended \$43.7 million, a decrease of 10%.

Unlike fiscal 1981, justices' salaries, travel expenses and court officers have been excluded from the District Court's budget for fiscal 1982. These items are now included in the Trial Court's budget. If the justices' salaries were included in the District Courts' budget, the governor's recommendation for the District Court Department would rise to \$50.2 million, an increase of 3.3% over fiscal 1981.

G. PROBATE AND FAMILY COURT DEPARTMENT

FY 1980	\$ 8,965,418
FY 1981	10,490,785
Requested for FY 1982	16,038,429
Recommended for FY 1982	9,971,970

The total appropriations for the Probate and Family Court Department increased 17% in fiscal 1981. This exceeded the executive recommendation by \$40,043. The allocation, however, fell short of the judicial request by \$3.7 million.

The greatest increase occurred in the administration category. Appropriations for the administrative staff increased from \$90,000 in fiscal 1980 to \$134,000 in fiscal 1981, an increase of 48.9%. County Departments received a 16.66% increase, totaling more than \$1.4 million. The most significant increases at the divisional level occurred in the Hampshire (57.28%), Barnstable (48.42%), Middlesex (22.35%), and Plymouth (20.12%) Divisions. (See Table 1.5)

The maximum positions funded also increased in fiscal 1981. The county departments received a 4.1% increase in personnel, raising the total number of employees from 559 to 582. Only two divisions had reductions in personnel. Middlesex County lost four positions, and Franklin County lost one position. The greatest increases in personnel occurred in the Hampshire (15.38%), Plymouth (13.89%), and Barnstable (12.5%) Counties. (See Table 1.6)

The judiciary has asked for \$16 million for fiscal 1982, an increase of 52.9%. The executive recommendation is \$9.9 million, a 5% decrease from fiscal 1981.

The major reason for the proposed decrease is that appropriations for justices' salaries and court officers will be budgeted through the Trial Court in fiscal 1981. If justices' salaries were included in the Probate Departments budgets, the governor's recommendation would equal \$11.4 million. This represents an 8.8% increase in appropriations over fiscal 1981.

H. LAND COURT DEPARTMENT

FY 1980	\$1,273,414
FY 1981	1,346,000
Requested for FY 1982	1,543,438
Recommended for 1982	1,230,206

Appropriations for the Land Court increased 5.7% in fiscal 1981. These appropriations exceed the 1981 recommendation by \$98,898, but fell short of the judicial request by \$89,237. The maximum number of permanent positions funded increased from sixty-three in fiscal 1980 to seventy in fiscal 1981.

The judicial request for fiscal 1982 would increase the budget of the Land Court by 14.7%. Alternatively, the governor's recommendation would decrease appropriations by 8.6%.

The salaries of the justices and court officers are not included in the fiscal 1982 budget for the Land Court. These expenditures will be funded through the Trial Court in fiscal 1982. Including the justices' salaries in the Land Court would increase the governor's recommendation to \$1.5 million, an increase of 13.6% over fiscal 1981.

I. BOSTON MUNICIPAL COURT DEPARTMENT

FY 1980	\$ 3,609,895
FY 1981	3,888,586
Requested for FY 1982	4,852,165
Recommended for 1982	3,487,855

The Boston Municipal Court Department received \$283,691 more in fiscal 1981 than in fiscal 1980, an increase of 7.86%. The allocation exceeded the fiscal 1981 executive recommendation by \$39,000, but was \$89,237 less than the judicial request. The maximum positions funded remained the same for fiscal 1981, at 209 permanent positions.

The executive recommendation for fiscal 1982 would decrease the budget of the Boston Municipal Court by 10.3%. The judicial request for fiscal 1982 would increase the budget by 24.8%.

These projections do not include the salaries and traveling expenses of the justices or expenditures for court officers. These items will be funded through the Trial Court in fiscal 1982. If the salaries of the justices were included, the governor's recommendation would equal \$3.87 million. Additional expenditures for court officers and travel would bring the governor's recommendation close to the fiscal 1981 appropriation level. Accordingly, there will be no dramatic decrease in the Boston Municipal Court's budget in fiscal 1982.

J. HOUSING COURT

FY 1980	869,992
FY 1981	963,302
Requested for FY 1982	\$ 1,130,601
Recommended for 1982	846,884

Total appropriations for the Housing Court Department increased 10.72% in fiscal 1981. Funding for this department was less than both the fiscal 1981 judicial request and governor's recommendation.

Funds for the salaries and expenses of the administrative staff increased from \$55,000 in fiscal 1980 to \$60,000 in fiscal 1981. The Boston Division received a 9.58% increase in funds. The Hampden Division received an increase of 15.15%.

Personnel changes in this department were minor. The administrative staff remained constant at three permanent positions. The Hampden Division maintained its present staff of ten permanent employees. The only change was recorded in the Boston Division where the staff increased from thirty-two to thirty-five permanent employees.

The judiciary has asked for a 74.4% increase in the budget of the Housing Court for fiscal 1982. The governor's recommendation, however, would decrease the budget by 12.1%.

Like the other departments, salaries and expenses of the justices and court officers of the Housing Court will be funded through the Trial Court in fiscal 1982. If justices' salaries were included, the governor's recommendation would be \$933,884. Addition of travel expenses and expenses for court officers would bring the governor's recommendation close to the fiscal 1981 appropriation.

K. JUVENILE COURT DEPARTMENT

FY 1980	\$ 3,536,467
FY 1981	4,345,436
Requested for FY 1982	5,589,392
Recommended for 1982	4,306,059

Appropriations for the Juvenile Court Department were increased by 22.875% in fiscal 1981. While these funds exceeded the governor's recommendation, they were \$5.9 million less than the judicial request for fiscal 1981.

All divisions of the Juvenile Court Department received budget increases in fiscal 1981. The Boston Division was given an increase of 19.2%, raising its budget from \$1.6 million in fiscal 1980 to \$2.1 million in fiscal 1981. The Bristol Division obtained a 19.20% increase in its budget, from \$620,773 in fiscal 1980 to \$740,000 in fiscal 1981. The budget for the

Springfield Division increased from \$688,843 in fiscal 1980 to \$770,000 in fiscal 1981, an 11.78% rise in allocations. Appropriations for the Worcester Division increased 24.49% from \$457,045 in fiscal 1980 to \$568,695 in fiscal 1981.

There were few personnel changes in the Juvenile Court Department. The administrative staff remained constant at four permanent positions. Permanent positions for the Boston District remained at ninety-seven employees. The Springfield Division maintained its thirty-two permanent positions. Personnel changes occurred in the Bristol and Worcester Divisions. In Bristol, the maximum positions funded declined from thirty-seven to thirty-four permanent employees. The Worcester Division lost one permanent position, reducing its present staff to twenty-five.

The judiciary has asked for 28.6% increase in appropriations for fiscal 1982. The executive recommendation would decrease the budget of the Juvenile Court by .9%.

If the salaries of the justices of the Juvenile Court were included in the governor's recommendation, appropriations would rise to \$4.6 million, an increase of 5.9% over fiscal 1981. Accordingly, the governor's recommendation does not represent an actual decrease in funding for the Juvenile Court Department.

L. CAPITAL OUTLAY PROGRAMS

Several courts received capital outlay funds for improving court facilities in fiscal 1981. Under Chapter 578, §2 of the Acts of 1980, the First Bristol Division received \$500,000 for plans of renovations, including land acquisition for expanding its facilities. Funds were also provided for renovations and improvements to the Third District Court building in East Cambridge. Chapter 578 provided \$2.35 million to reactivate this building for court use. The Framingham Division received \$100,000 for plans and specifications for an addition to the courthouse.

The judiciary has asked for \$70,320 for special equipment in fiscal 1982. The governor agreed with this request in his recommendation. Norfolk Probate Court is scheduled to receive \$23,460 of these funds for a microfilm camera. The Suffolk Superior Civil Court has asked \$46,860 for docket rack cabinets in order to double storage capacity for civil action records.

Table I
BUDGET ANALYSIS: FISCAL YEAR 1981

	COMPARISON OF 1981 AND 1980 BUDGETS				1981 BUDGET V. REQUEST FOR 1981			1981 BUDGET V. EXECUTIVE RECOMMENDATIONS		
	Appropriation for 1981	Appropriation for 1980	Amount of Increase or Decrease (Dollars)	% of Increase or Decrease	Amount Requested for 1981	Difference Between Request & Appropriation	% of Request Appropriated	Executive Recommendation for 1981	Difference Between Recommendation & Appropriation	% of Recommendation Appropriated
0321 Supreme Judicial Court	6,252,146	5,782,938	+ 469,208	+ 8.114%	11,625,413	- 5,373,267	53.78%	6,790,644	- 538,498	- 92.07%
0321-1001 Massachusetts Defenders	3,000,000	2,900,000	+ 100,000	+ 3.44%	7,877,557	- 4,877,557	38.08%	3,780,848	- 780,848	- 79.35%
0321-2000 Mental Health Division	122,796	112,374	+ 10,422	+ 9.274%	459,666	- 336,870	26.71%	118,492	+ 4,304	+ 103.63%
0320-003 Salaries and Expenses	1,818,900	1,514,092	+ 30,408	+ 20.131%	1,926,816	- 107,916	94.4%	1,903,219	- 84,316	- 95.57%
0322 Appeals Court	1,543,500	1,383,767	+ 159,733	+ 11.543%	1,588,057	- 44,557	97.19%	1,588,057	- 44,557	- 97.19%
0330 Trial Court Administration and Programs	12,116,010	5,669,459	+ 6,446,551	+ 113.706%	14,724,230	- 2,608,220	82.29%	14,030,347	- 1,914,337	- 86.36%
0330-2200 Court Facility Rental	11,805,561	5,754,784	+ 6,050,777	+ 105.143%	27,570,896	- 15,765,335	42.82%	5,229,602	+ 7,236,338	+ 225.74%
0330-0200 Recall of Judges	650,000	500,000	+ 150,000	+ 30%	808,750	- 158,750	80.37%	500,000	+ 150,000	+ 130%
0330-0300 Administrative Staff	1,261,374	675,000	+ 586,374	+ 86.87%	1,479,962	- 218,588	85.23%	1,400,968	- 139,594	- 90.04%
0330-1000 Jury Expense	3,745,000	4,519,024 ¹	- 774,024	- 17.1%	5,000,000	- 1,255,000	74.9%	3,745,000	0	100%
0330-2100 Counsel to Indigent	4,734,708	0	+ 4,734,708	—	2,500,000	+ 2,234,708	189.39%	4,734,708	0	100%

0330-2300 Witness Fees	550,000	654,145 ²	- 104,145	- 15.9%	1,500,000	- 950,000	33.67%	550,000	0	100%
0330 TOTAL ADMIN- ISTRATION	23,921,571	12,227,144 ¹	+ 11,694,427	+ 95.6%	42,295,126	- 18,373,555	56.56%	19,259,949	+ 4,661,622	+ 124.2%
0331 County Departments Superior Court	16,317,915	16,666,736	- 348,821	- 2.0929%	24,532,361	- 8,214,446	- 66.52%	16,729,921	- 412,006	- 97.54%
0331 TOTAL SUPERIOR COURT DEPARTMENT	24,444,665	19,395,882 ⁴	+ 5,048,783	26%	33,471,654	- 17,153,739	- 73.03%	24,971,690	- 527,025	- 97.89%
0332 DISTRICT COURT DEPARTMENT ADMINISTRATIVE STAFF	284,000	258,466	+ 25,534	+ 9.879%	553,282	- 269,282	- 51.33%	428,339	- 144,339	- 66.3%
0332 TOTAL	48,599,331	43,268,951	+ 5,330,380	+ 12.32%	64,368,811	15,769,480	75.5%	47,950,174	+ 649,157	+ 101.35%
0333 Probate Courts	10,490,785	8,965,418	+ 1,525,367	+ 17.013%	14,150,557	- 3,659,772	- 74.14%	+ 10,450,742	+ 40,043	+ 100.38%
0334 Land Court	1,346,000	1,273,414	+ 72,586	+ 5.7001%	1,435,237	- 89,237	- 93.78%	1,327,102	+ 18,898	+ 101.42%
0335 Boston Municipal Court	3,888,586	3,604,895	+ 283,691	+ 7.869%	5,286,254	- 1,397,668	- 73.56%	3,849,586	+ 39,000	+ 101.01%
0336 Housing Court	963,302	869,992	+ 93,310	+ 10.725%	1,144,874	- 181,572	- 84.14%	994,741	- 31,439	- 96.84%
0337 Juvenile Court	4,345,436	3,536,467	+ 808,969	+ 22.875%	6,374,672	- 2,029,236	- 68.17%	4,318,981	+ 26,455	+ 100.61%
0340 District Attorneys	16,937,859	15,245,736	+ 1,692,123	+ 9.99%	22,788,238	- 5,850,379	- 74.33%	16,770,117	+ 167,742	+ 101%
03 TOTALS	144,938,993	136,222,354 ¹	+ 8,716,634	+ 6.4%	209,147,000	- 64,208,007	- 69.3%	140,889,777	+ 404,926	+ 102.87%

¹ Taken from fiscal 1980 Superior Court budget item No. 0331-0400. Includes \$1.19 million in supplemental funds appropriated during fiscal 1980.

² Includes \$154,000 in supplemental funds appropriated during fiscal 1980.

³ Includes \$803,801 in supplemental funds appropriated during fiscal 1980.

⁴ Does not include appropriations for jury expenses. See footnote No. 1.

⁵ Includes \$1.8 million in supplemental funds appropriated during fiscal 1980.

Table 1.1
SUPERIOR COURT APPROPRIATIONS

County Divisions	Appropriation For 1981	Appropriation For 1980	Amount Increase or Decrease (Dollars)	% Increase or Decrease
Barnstable	320,000	165,530	+ 154,470	+ 48.271%
Berkshire	235,000	242,080	- 7,080	- 2.924%
Bristol	800,000	912,294	- 112,294	- 12.309%
Dukes	47,267	22,713	+ 24,554	+ 108.105%
Essex	1,390,000	1,040,769	+ 349,231	+ 33.55%
Franklin	158,000	81,759	+ 76,241	+ 93.25%
Hampden	1,355,667	1,216,117	+ 139,550	+ 11.475%
Hampshire	262,000	269,615	- 7,615	- 2.824%
Middlesex	3,180,000	3,716,623	- 536,623	- 14.438%
Nantucket	45,500	26,085	+ 19,415	+ 74.429%
Norfolk	1,500,000	1,295,832	+ 204,168	+ 15.755%
Plymouth	1,091,816	843,641	+ 248,175	+ 29.416%
Suffolk (Civil)	1,967,651	1,895,288	+ 72,363	+ 3.818%
Suffolk (Criminal)	2,575,014	3,458,774	- 883,760	- 25.55%
Worcester	1,390,000	1,479,616	- 89,616	- 6.056%
County Departments				
TOTALS	16,317,915	16,666,736	- 348,821	- 2.092%
Administration	8,126,750	3,748,170	+ 4,378,580	+ 116.8%
Superior Court				
TOTALS	24,444,665	19,395,882	+ 5,048,783	+ 26%

Table 1.2
SUPERIOR COURT PERSONNEL

County Divisions	Max. Positions Funded 1981	Max. Positions Funded 1980	Actual Increase or Decrease in Positions	% Increase or Decrease
Barnstable	7	7	0	0
Berkshire	6	13	- 7	+ 53.85%
Bristol	26	50	- 24	- 48%
Dukes	2	1	+ 1	+ 50%
Essex	37	54	- 17	- 31.48%
Franklin	4	4	0	0
Hampden	44	66	- 22	- 33.33%
Hampshire	7	5	- 8	- 53.33%
Middlesex	106	207	- 101	- 48.79%
Nantucket	2	2	0	0
Norfolk	38	57	- 19	- 33.33%
Plymouth	65	55	+ 10	+ 18.18%
Suffolk (Civil)	122	122	0	0
Suffolk (Criminal)	146	204	- 58	- 28.43%

County Divisions	Max. Positions Funded 1981	Max. Positions Funded 1980	Actual Increase or Decrease in Positions	% Increase or Decrease
Worcester	68	88	- 20	- 22.72%
County Departments				
TOTALS	680	945	- 265	- 28.04

Table 1.3
DISTRICT COURTS APPROPRIATIONS

District Court By County	Appropriation for 1981	Appropriation for 1980	Amount Increase or Decrease (Dollars)	% Increase or Decrease
Barnstable County				
First Dist. Ct., Barnstable (Barnstable)	845,000	762,529	+ 82,471	+ 10.82%
Second Dist. Ct., Barnstable (Orleans)	455,000	405,608	+ 49,392	+ 12.18%
Berkshire County				
Northern Dist. Ct., Berkshire (Adams, North Adams, Williamstown)	439,000	344,635	+ 94,365	+ 27.38%
Central Dist. Ct., Berkshire (Pittsfield)	418,500	387,141	+ 31,359	+ 8.1%
Southern Dist. Ct., Berkshire (Great Barrington, Lee)	267,000	233,259	+ 33,741	+ 14.47%
Bristol County				
First Dist. Ct., Bristol (Taunton)	528,500	429,975	+ 98,525	+ 28.914%
Second Dist. Ct., Bristol (Fall River)	921,080	718,890	+ 202,190	+ 28.13%
Third Dist. Ct., Bristol (New Bedford)	850,000	815,560	+ 34,440	+ 4.22%
Fourth Dist. Ct., Bristol (Attleboro)	451,515	328,418	+ 123,097	+ 37.48%
Dukes County				
Dist. Ct., Edgartown (Edgartown)	162,000	151,405	+ 10,595	+ 6.99%
Essex County				
First Dist. Ct., Essex (Salem)	750,000	657,993	+ 92,007	+ 13.98%
Second Dist. Ct., Essex (Amesbury)	244,000	278,096	- 34,096	- 12.26%
Third Dist. Ct., Essex (Ipswich)	169,000	167,403	+ 1,597	+ .95%
Central Northern Dist. Ct., Essex (Haverhill)	630,500	503,929	+ 126,571	+ 25.12%
Eastern Dist. Ct., Essex (Gloucester)	390,000	355,057	+ 34,943	+ 9.84%

District Court By County	Appropriation for 1981	Appropriation for 1980	Amount Increase or Decrease (Dollars)	% Increase or Decrease
Dist. Ct., Lawrence (Lawrence)	807,000	675,533	+ 131,467	+ 19.46%
Dist. Ct., Newburyport (Newburyport)	266,000	229,343	+ 36,657	+ 15.98%
Dist. Ct., Peabody (Peabody)	517,745	461,077	+ 56,668	+ 12.29%
Franklin County				
Dist. Ct., Greenfield (Greenfield)	413,250	364,642	+ 48,608	+ 13.33%
Dist. Ct., Orange (Orange)	210,000	149,435	+ 60,565	+ 40.53%
Hampden County				
Dist. Ct., Chicopee (Chicopee)	400,000	442,000	- 42,000	- 9.5%
Dist. Ct., Holyoke (Holyoke)	485,000	466,839	+ 18,161	+ 3.89%
Eastern Dist. Ct., Hampden (Palmer)	398,000	366,795	+ 31,205	+ 8.51%
Dist. Ct., Springfield (Springfield)	1,885,000	1,732,100	+ 152,900	+ 8.83%
Western Dist. Ct., Hampden (Westfield)	400,000	380,517	+ 19,483	+ 5.12%
Hampshire County				
Dist. Ct., Hampshire (Northampton)	691,000	631,208	+ 59,792	+ 9.4%
Eastern Dist. Ct., Hampshire (Ware)	181,047	142,031	+ 39,016	+ 27.47%
Middlesex County				
Dist. Ct., Lowell (Lowell)	1,250,000	1,057,164	+ 192,836	+ 18.29%
Dist. Ct., Somerville (Somerville)	1,061,000	920,375	+ 140,625	+ 15.28%
Dist. Ct., Newton (Newton)	580,000	497,258	+ 82,742	+ 16.64%
Dist. Ct., Marlborough (Marlborough)	460,000	402,570	+ 57,430	+ 14.27%
Dist. Ct., Natick (Natick)	325,892	296,320	+ 29,572	+ 9.98%
First Eastern Dist. Ct., Middlesex (Malden)	1,103,000	970,000	+ 133,000	+ 13.71%
Second Eastern Dist. Ct., Middlesex (Waltham)	735,000	669,516	+ 65,484	+ 9.78%
Third Eastern Dist. Ct., Middlesex (Cambridge)	2,000,000	1,830,617	+ 169,383	+ 9.25%
Fourth Eastern Dist. Ct., Middlesex (Woburn)	1,009,728	929,589	+ 80,139	+ 8.62%
First Northern Dist. Ct., Middlesex (Ayer)	713,701	590,483	+ 123,218	+ 20.86%

District Court By County	Appropriation for 1981	Appropriation for 1980	Amount Increase or Decrease (Dollars)	% Increase or Decrease
First Southern Dist. Ct., Middlesex (Framingham)	1,022,000	954,849	+ 67,151	+ 7.03%
Central Dist. Ct., Middlesex (Concord)	809,000	713,535	+ 95,465	+ 13.38%
Nantucket County				
Dist. Ct., Nantucket (Nantucket)	130,924	97,566	+ 33,358	+ 34.19%
Norfolk County				
Northern Dist. Ct., Norfolk (Dedham)	835,000	767,959	+ 67,041	+ 8.73%
Western Dist. Ct., Norfolk (Quincy)	1,620,000	1,405,000	+ 430,000	+ 30.6%
Western Dist. Ct., Norfolk (Wrentham)	655,000	600,648	+ 54,352	+ 9.05%
Southern Dist. Ct., Norfolk (Norfolk)	546,000	495,452	+ 50,548	+ 5.76%
Brookline Mun. Ct. (Brookline)	468,000	443,099	+ 24,901	+ 10.2%
Plymouth County				
Dist. Ct., Brockton (Brockton)	1,147,000	937,104	+ 209,896	+ 22.4%
Second Dist. Ct., Plymouth (Hingham)	697,572	626,558	+ 71,014	+ 11.33%
Third Dist. Ct., Plymouth (Plymouth)	580,000	487,461	+ 92,539	+ 18.98%
Fourth Dist Ct., Plymouth (Wareham)	437,477	387,894	+ 49,583	+ 12.78%
Suffolk County				
Dist. Ct., Brighton (Brighton)	610,000	538,070	+ 71,930	+ 13.37%
Dist. Ct., Charlestown (Charlestown)	411,000	391,237	+ 19,763	+ 5.05%
Dist. Ct., Chelsea (Chelsea)	728,000	727,751	+ 249	+ .034%
Dist. Ct., Dorchester (Dorchester)	1,965,040	1,807,803	+ 157,237	+ 8.7%
Dist. Ct., East Boston (East Boston)	844,000	819,530	+ 24,470	+ 2.99%
Dist. Ct., Roxbury (Roxbury)	2,471,400	2,369,677	+ 101,723	+ 4.29%
Dist. Ct., South Boston (South Boston)	584,739	522,826	+ 61,913	+ 11.84%
Dist. Ct., West Roxbury (West Roxbury)	821,975	712,876	+ 109,099	+ 15.3%
Worcester County				
Dist. Ct., Worcester (Worcester)	1,600,000	1,286,214	+ 313,786	+ 24.4%

District Court By County	Appropriation for 1981	Appropriation for 1980	Amount Increase or Decrease (Dollars)	% Increase or Decrease
Worcester County (cont.)				
Dist. Ct., Fitchburg (Fitchburg)	463,858	417,768	+ 11.03%	+ 46,090
Dist. Ct., Leominster (Leominster)	271,500	232,075	+ 16.99%	+ 39,425
Dist. Ct., Winchendon (Winchendon)	152,385	95,945	+ 58.82%	+ 56,440
First Northern Dist. Ct., Worcester (Gardner)	498,000	478,778	+ 4.015%	+ 19,222
First Eastern Dist. Ct., Worcester (Westborough)	520,000	495,272	+ 4.99%	+ 24,728
Second Eastern Dist. Ct., Worcester (Clinton)	285,000	270,304	+ 5.44%	+ 14,696
First Southern Dist. Ct., Worcester (Dudley)	464,000	434,577	+ 6.77%	+ 29,423
Second Southern Dist. Ct., Worcester (Uxbridge)	270,000	254,750	+ 5.99%	+ 15,250
Third Southern Dist. Ct., Worcester (Milford)	375,000	287,889	+ 30.26%	+ 87,111
Dist. Ct., Worcester (Brookfield)	202,000	169,126	+ 19.44%	+ 32,874
Juvenile Probation Districts				
Berkshire Juvenile Probation Dist.	123,807	102,989	+ 20.21%	+ 20,818
Middlesex Juvenile Probation Dist.	600,000	444,796	+ 34.89%	+ 155,204
Northern Essex Juvenile Probation Dist.	226,593	199,812	+ 13.4%	26,781
Northern Worcester Juvenile Probation Dist.	250,603	191,357	+ 30.96%	+ 59,246
Plymouth Juvenile Probation Dist.	300,000	271,813	+ 10.37%	+ 28,187
Southern Worcester Juvenile Probation Dist.	193,000	166,342	+ 16.03%	+ 26,658
Division Totals	48,315,331	43,010,485	+ 12.33%	+ 5,304,846
Administrative Staff	284,000	258,466	+ 9.88%	+ 25,534
District Court Department Total	48,599,331	43,268,951	+ 12.32%	+ 5,330,380

Table 1.4
DISTRICT COURTS PERSONNEL

District Court by County	Max. Positions Funded 1981	Max. Positions Funded 1980	Actual Increase or Decrease in Positions	% Increase or Decrease
Barnstable County				
First Dist. Ct., Barnstable (Barnstable)	45	43	+ 2	+ 4.65%
Second Dist. Ct., Barnstable (Orleans)	26	27	- 1	- 3.7%
Berkshire County				
Northern Dist. Ct., Berkshire (Adams, North Adams, Williamstown)	17	21	- 4	- 19.05%
Central Dist. Ct., Berkshire (Pittsfield)	23	19	+ 4	+ 21.05%
Southern Dist. Ct., Berkshire (Great Barrington, Lee)	12	11	+ 1	+ 9.09%
Bristol County				
First Dist. Ct., Bristol (Taunton)	30	26	+ 4	+ 15.4%
Second Dist. Ct., Bristol (Fall River)	50	50	0	0
Third Dist. Ct., Bristol (New Bedford)	46	53	- 7	- 13.2%
Fourth Dist. Ct., Bristol (Attleboro)	23	24	- 1	- 4.17%
Dukes County				
Dist. Ct., Edgartown (Edgartown)	9	10	- 1	- 10%
Essex County				
First Dist. Ct., Essex (Salem)	37	37	0	0
Second Dist. Ct., Essex (Amesbury)	12	14	- 2	- 14.29%
Third Dist. Ct., Essex (Ipswich)	8	11	- 3	- 27.27%
Central Northern Dist. Ct., Essex (Haverhill)	32	32	0	0
Eastern Dist. Ct., Essex (Gloucester)	20	20	0	0
Dist. Ct., Lawrence (Lawrence)	43	45	- 2	- 4.4%
Southern Dist. Ct., Essex (Lynn)	42	43	- 1	- 2.33%
Dist. Ct., Newburyport (Newburyport)	11	11	0	0
Dist. Ct., Peabody (Peabody)	27	27	0	0

District Court by County	Max. Positions Funded 1981	Max. Positions Funded 1980	Actual Increase or Decrease in Positions	% Increase or Decrease
Franklin County				
Dist. Ct., Greenfield (Greenfield)	22	24	- 2	- 8.33%
Dist. Ct., Orange (Orange)	7	9	- 2	- 22.22%
Hampden County				
Dist. Ct., Chicopee (Chicopee)	19	21	- 2	- 9.52%
Dist. Ct., Holyoke (Holyoke)	28	28	0	0
Eastern Dist. Ct., Hampden (Palmer)	20	22	- 2	- 9.09%
Dist. Ct., Springfield (Springfield)	118	118	0	0
Western Dist. Ct., Hampden (Westfield)	21	23	- 2	8.7%
Hampshire County				
Dist. Ct., Hampshire (Northampton)	38	40	- 2	- 5%
Eastern Dist. Ct., Hampshire (Ware)	8	4	+ 4	+ 100%
Middlesex County				
Dist. Ct., Lowell (Lowell)	64	64	0	0
Dist. Ct., Somerville (Somerville)	59	56	+ 3	+ 5.36%
Dist. Ct., Newton (Newton)	38	30	+ 8	+ 26.67%
Dist. Ct., Marlborough (Marlborough)	24	26	- 2	- 7.69%
Dist. Ct., Natick (Natick)	15	15	0	0
Eastern Dist. Ct., Middlesex (Malden)	60	59	+ 1	+ 1.69%
Second Eastern Dist. Ct., Middlesex (Waltham)	41	42	- 1	- 2.38%
Third Eastern Dist. Ct., Middlesex (Cambridge)	117	122	- 5	- 4.09%
Fourth Eastern Dist. Ct., Middlesex (Woburn)	55	55	0	0
First Eastern Dist. Ct., Middlesex (Ayer)	35	35	0	0
First Southern Dist. Ct., Middlesex (Framingham)	54	51	+ 3	+ 5.88%
Central Dist. Ct., Middlesex (Concord)	42	42	0	0

District Court by County	Max. Positions Funded 1981	Max. Positions Funded 1980	Actual Increase or Decrease in Positions	% Increase or Decrease
Nantucket County				
Dist. Ct., Nantucket (Nantucket)	6	8	-2	-25%
Norfolk County				
Northern Dist. Ct., Norfolk (Dedham)	48	48	0	0
Norfolk County (cont.)				
Eastern Dist. Ct., Norfolk (Quincy)	88	87	+1	+1.16%
Western Dist. Ct., Norfolk (Wrentham)	36	36	0	0
Southern Dist. Ct., Norfolk (Norfolk)	28	27	+1	+3.7%
Brookline Mun. Ct. (Brookline)	26	26	0	0
Plymouth County				
Dist. Ct., Brockton (Brockton)	55	55	0	0
Second Dist. Ct., Plymouth (Hingham)	42	41	+1	+2.44%
Third Dist. Ct., Plymouth (Plymouth)	34	29	+5	+17.24%
Fourth Dist. Ct., Plymouth (Wareham)	26	24	+2	+8.33%
Suffolk County				
Dist. Ct., Brighton (Brighton)	34	35	-1	-2.86%
Dist. Ct., Charlestown (Charlestown)	18	18	0	0
Dist. Ct., Chelsea (Chelsea)	46	46	0	0
Dist. Ct., Dorchester (Dorchester)	115	115	0	0
Dist. Ct., East Boston (East Boston)	47	42	+5	+11.9%
Dist. Ct., Roxbury (Roxbury)	135	144	-9	-6.25%
Dist. Ct., South Boston (South Boston)	26	26	0	0
Dist. Ct., West Roxbury (West Roxbury)	45	44	+1	+2.27%
Worcester County				
Dist. Ct., Worcester (Worcester)	80	76	+4	+5.26%
Dist. Ct., Fitchburg (Fitchburg)	25	23	+2	+8.7%

District Court by County	Max. Positions Funded 1981	Max. Positions Funded 1980	Actual Increase or Decrease in Positions	% Increase or Decrease
Worcester County (cont.)				
Dist. Ct., Leominster (Leominster)	12	10	+ 2	+ 20%
Dist. Ct., Winchendon (Winchendon)	5	5	0	0
Northern Dist. Ct., Worcester (Gardner)	27	27	0	0
First Eastern Dist. Ct., Worcester (Westborough)	32	31	+ 1	+ 3.23%
Second Eastern Dist. Ct., Worcester	14	14	0	0
First Southern Dist. Ct., Worcester (Dudley)	25	25	0	0
Second Southern Dist. Ct., Worcester (Uxbridge)	13	13	0	0
Third Southern Dist. Ct., Worcester (Milford)	18	16	+ 2	+ 12.5%
Dist. Ct., Worcester (Brookfield)	8	8	0	0
Juvenile Probation Districts				
Berkshire Juvenile Probation Dist.	6	6	0	0
Middlesex Juvenile Probation Dist.	24	21	+ 3	+ 14.29%
Northern Essex Juvenile Probation Dist.	12	12	0	0
Northern Worcester Juvenile Probation Dist.	18	18	0	0
Southern Worcester Juvenile Probation Dist.	10	10	0	0
TOTAL	2593	2587	+ 6	+ .23%

Table 1.5
PROBATE COURT APPROPRIATIONS

County Divisions	Appropriation For 1981	Appropriation For 1980	Amount Increase or Decrease (Dollars)	% Increase or Decrease
Barnstable	396,035	266,838	+ 129,197	+ 48.42%
Berkshire	242,078	235,107	+ 6,971	+ 2.97%
Bristol	663,042	556,593	+ 106,449	+ 19.125
Dukes	94,000	87,593	+ 6,407	+ 7.31%
Essex	911,966	770,986	+ 140,980	+ 18.29%
Franklin	190,857	168,543	+ 22,314	+ 13.24%
Hampden	800,241	711,117	+ 89,124	+ 12.53%
Hampshire	333,764	259,454	+ 148,620	+ 57.28%

County Divisions	Appropriation For 1981	Appropriation For 1980	Amount Increase or Decrease (Dollars)	% Increase or Decrease
Middlesex	2,095,970	1,713,025	+ 382,945	+ 22.35%
Nantucket	78,000	75,343	+ 2,657	+ 3.53%
Norfolk	1,252,525	1,122,225	+ 130,300	+ 11.61%
Plymouth	818,000	681,000	+ 137,000	+ 20.12%
Suffolk	1,473,978	1,278,837	+ 195,141	+ 15.26%
Worcester	955,000	906,818	+ 48,182	+ 5.31%
County Departments	10,305,456	8,833,479	+ 1,471,977	+ 16.66%
TOTALS				
Administrative Staff	134,000	90,000	+ 44,000	+ 48.89%
Middlesex Family Service Clinic	51,329	41,939	+ 9,390	+ 22.39%
TOTALS	1,490,785	8,965,418	1,525,367	17.013%

Table 1.6
PROBATE COURTS PERSONNEL

County Divisions	Max. Positions Funded 1981	Max. Positions Funded 1980	Actual Increase or Decrease in Positions	% Increase or Decrease
Barnstable	18	16	2	+ 12.5%
Berkshire	12	12	0	0
Bristol	37	36	1	+ 2.78%
Dukes	4	4	0	0
Essex	51	46	5	+ 10.87%
Franklin	9	10	- 1	- 10%
Hampden	52	48	4	+ 8.33%
Hampshire	15	13	2	+ 15.38%
Middlesex	119	123	- 4	- 3.25%
Nantucket	3	3	0	0
Norfolk	67	64	3	+ 4.69%
Plymouth	41	36	5	+ 13.89%
Suffolk	91	87	4	+ 4.6%
Worcester	63	61	2	+ 3.28%
County Departments				
TOTALS	582	559	+ 23	+ 4.1%

Table 2
THE UNIFIED BUDGET - FY 1982

Some Budget Indicators - Court Consolidation - FY 1982 - \$158.2 Million
(Percentages are Approximate - Subject to Action by the General Court)

	The Consolidated Judicial Budget	Appropriated for 1981	Requested for 1982	Amount of Increase Requested	% Increase Req'd	Increase Recommended (Dollars)	% Increase Req'd	Executive Recommendation FY 1982 to be Appropriated	General Court Actual Appropriation FY 1982
0320	Supreme Judicial Court	6,252,146	11,622,473	5,370,327	85.9%	1,891,429	30.3%	7,193,575	
0321-1001	Massachusetts Defenders	3,000,000	8,226,121	5,226,121	174.2%	1,004,149	33.5%	4,004,149	
0321-2000	Mental Health Division	122,796	156,562	33,766	27.5%	60,280	49.1%	183,076	
0320-0004	Salaries & Expenses	1,818,900	1,995,717	176,817	9.7%	101,051	5.6%	1,919,951	
0322	Appeals Court	1,543,500	1,636,347	92,847	6.02%	37,462	2.4%	1,580,962	
0330	Trial Court Administration								
	1. Administration & Programs	12,116,010	39,460,526	27,344,516	225.7%	22,967,243	189.6%	35,083,253	
0330-2200	2. Court Facility Rental	11,805,561	24,731,055	12,925,494	109.5%	0	0	11,805,561	
0330-0200	3. Recall of Judges	650,000	650,000	0	0	0	0	650,000	
0330-0300	4. Administrative Staff	1,261,374	1,677,217	415,843	33.6%	112,464	8.9%	1,373,838	
0330-1000	5. Jury Expense	3,745,000	5,240,456	1,495,456	39.9%	971,410	25.9%	4,716,410	
0330-2100	6. Counsel to Indigent	4,734,708	9,032,727	4,298,019	90.8%	2,354,409	49.7%	7,089,117	
0330-2300	7. Witness Fees	550,000	1,500,000	950,000	172.7%	246,054	44.7%	796,054	
0330	TOTAL ADMINISTRATION	\$23,921,571	\$64,191,581	\$40,270,010	168.3%	\$22,967,243	96.0%	\$46,888,814	

Department Operations

0331	County Departments Superior Court	16,317,915	21,193,386	4,875,471	29.9%	- 5,708,746	- 35%	10,609,169
		\$24,444,665	\$30,301,256	\$5,856,591	24%	-\$7,801,189	- 31.9%	\$16,643,476
0332	DISTRICT COURTS							
	Administrative Staff	284,000	496,947	212,947	75%	43,818	15.4%	327,818
0332	TOTAL	\$48,599,331	\$65,288,066	\$16,688,735	34.3%	-\$4,885,321	- 10.1%	\$43,714,010
0333	Probate Courts	10,490,785	16,038,429	5,547,644	52.9%	- 518,815	- 5%	9,971,970
0334	Land Court	1,346,000	1,543,438	197,438	14.7%	- 115,794	- 8.6%	1,230,206
0335	Boston Municipal Court	3,888,586	4,852,165	963,579	24.8%	- 400,731	- 10.3%	3,487,855
0336	Housing Court	963,302	1,130,601	167,299	17.4%	- 116,418	- 12.1%	846,884
0337	Juvenile Court	4,345,436	5,589,392	1,243,956	28.6%	- 39,377	- .9%	4,306,059
0340	District Attorneys	16,937,859	25,430,540	8,492,681	50.1%	2,610,561	15.4%	19,548,420
03	TOTALS	\$144,938,993	\$230,839,296	\$85,900,303	59.3%	\$13,258,012	9.2%	\$158,197,005

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MAY 1991

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CHARLESTOWN, MASS

